THE Touchstone OF Wills, Testaments, AND Administrations.

BEING A COMPENDIUM OF CASES and RESOLUTIONS Touching the same.

Carefully collected out of the Ecclesiastical, Civil, and Canon Laws.

As also out of The Customs, Common Laws, and Statutes of this Kingdom.

By G. MERITON, *Gent.*

Second Edition.

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To all his Loving Countrey-men.

Dear Friends,

HAving received a deep impression in my thoughts of that Christian-like Moral, *Non nobis solum nati sumus, sed partem Parentes, partem Amici, partem Patria vendicant*; I thereupon begun seriously to excogitate how I might lay out that small Talent which the Lord hath lent me, to the profit and good of my Countrey: and taking notice of the Quotidian enmities, Contentions and Quarrels, which arise amongst men about the Devises, Bequests and Legacies of their dead Friends, which most commonly happens by reason of the vitious penning of their Wills and Testaments, and is chiefly occasioned through the scarceness of Writers on this Subject in our English Tongue; there

being very few Books in the same Language, save Mr. *Swinbornes* excellent Treatise Testamentary, which is now almost out of Print, and can hardly be gotten at any Stationers; and besides, the price thereof doth exceed many honest Countreymans purse; and so many men are left in mists of ignorance, by reason whereof their Wills and Testaments are often so strangely drawn, with so many dubious, knotty, and somtimes nonsensical Clauses and Sentences therein, as that often the Testators meaning can scarcely, and sometimes not at all be found out, whereupon it happens that sometimes the Bequests and Devises are void, and so the Legataries lose that which was intended them; otherwhiles they are forced to sue for their Legacies, whenas doubts arise upon the Testators words and meaning in his Will, and then often the Remedy proves worse then the Disease, and

more

more Charges spent in the Law for the recovery of the Legacy, then sometimes it is worth: Therefore, that my honest Countreymen may be partly inform'd in some particulars how they may dispose of their Estates at their deaths, and that they may make their Wills according to Law, so that their intentions and meanings may not be perverted and wrested to a wrong sense after their deaths, and those who were intended and expected to reap benefit by the Testators death, robbed of their just Rights and Dues; I have thereupon taken the pains to collect several Cases and Resolutions, out of the Ecclesiastical, Civil, and Canon-Laws; and also out of the Customs, Common Laws, & Statutes of this Realm, touching Wills and Testaments, their several sorts and forms, what shall be a good Will, who may make one, and who may be an Executor, and of the several ways of appointing them

and also touching Tutors, Childrens Portions, Devises and Legacies, together with the Probate of Wills, passing Accounts, paiment of Mortuaries; and of the power of the Ordinary in granting of Administrations; and touching Appeals, and several other things, whereby my Countrey-men at an easie charge, and with little expence of time, may now take a view of those things which have so long been kept from their sight, under the Vizard-mask of an unknown Tongue, and they thereby deprived of the knowledge thereof. And now, dear Countrey-men, (for to you only do I speak) if I can have but your good-will, and good-word for all this, it shall suffice

Your loving Countreyman and Servant,

GEORGE MERITON.

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THE

THE TOUCHSTONE OF WILLS and TESTAMENTS.

CHAP. I.

What a Testament is, with the several kinds and forms thereof; and the difference between a Testament, a last Will, and a Codicil.

1. A Testament is derived of *Testatio Mentis*, and most properly is defined after this manner: *Testamentum est voluntatis nostræ justa Sententia, de eo quod quis post mortem suam fieri voluit.* A Testa-

ment is a just sentence of our Will touching that which one would have done after death. *Brat. Larches Rep. fol.* 137. *Cowells Instit. p.* 117. *Swinbrones Wills, &c. part* 1. *Sect.* 2. *in princ. Justinians Inst. Tit.* 10. *l.* 2. *de Test. Numb.* 1.

2. Every Testament is a last Will, but every last Will is not a Testament; for a last Will is a general word, and agreeth to every several kinde of last Will, or Testament; but its properly to be called a Testament, when an Executor is named: for by the naming an Executor, it differeth from the rest. *Franc. Mantica de Conjectura ultimar. voluntatum, lib.* 1. *Tit.* 5. *Swin. Part.* 1. *Sect.* 1. *Simo. de Pratis. de Interpretatione ult. val. lib.* 2. *Dubium* 1. *Solutio* 9.

3. Observe that of Testaments, some be written, some unwritten or Nuncupative; some solemn, some unsolemn; some priviledged, and some unpriviledged: of every kind whereof

whereof we shall speak a word or two. *Michael. Graff. Thesaur. communion. Sect. Testa. Quæstio* 10, 11. *numb.* 1, 3. *Franc. Mantica de Conject. ult. vol. lib.* 2. *Tit.* 7. *Swin. part* 1. *Sect.* 8.

4. Now as to the formal making of a Solemn Testament, many things are requisite by the Civil Law. As 1. That there be seven Witnesses present at the making thereof. 2. They must all be required to be there on purpose; for it is not sufficient, if they were there only by chance, and unrequested. 3. Every Witness must subscribe his Name with his own hand, if he can write, or else two or three others for him. 4. The Testator with his own hand also must write his own Name, and the Name of him whom he will have to succeed him, and have all his goods; and if the Testator cannot write, then he must name the party (that shall succeed him) before the Witnes-

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ses. 5. The Witnesses must be such as are not prohibited in that behalf. 6. The Witnesses must see and behold the Testator, and not hear him only; and the Witnesses also must seal the Testament, either with their own, or the seal of some other. And lastly, the Testament must be finished at one time, without any Intermission, except natural, such as cannot be avoided: And if any of these particulars be wanting, then it is reputed for a solemn Testament; but here in *England*, we are not necessarily tyed to observe this strict form of making our Testaments.

§. 5. For with us it is sufficient, if the Testator do appoint his Executor, and declare his Will before two or three Witnesses, whose probation of the same, as concerning the appointment of an Executor, or disposing of Goods and Chattels, is good enough; and such a Testament is called an unsolemn Testament.

ment. *Lyndwood in C. Statut. verb. Probatis lib. 3. Provincial. Const. Cant. Bract. l. 1. c. 16. Swin. part. 1. Sect. 3. and part. 4. Sect. 24. Glan. l. 7. c. 6.*

6. But if the Testator devise any Lands, Tenements, or Hereditaments, then the Testament must be in writing, and done in the lifetime of the Testator, and approved by him for his Will before his death, except in some special Cases. *See the next Chapter, Num 37. 32 H. 8. cap. 5. Noy's Maximes p. 97. & Swin. part. 1. sect. 11. & part. 4. sect. 25.*

7. Also if a man pleaseth he may make his Testament in writing, wherein he disposes of his Goods and Chattels only; and may also use the Testimony of more Witnesses then two, and procure them to subscribe their names to every sheet of the Testament; which is very safe, and may prevent many forgeries. *Swin. part. 1. sect. 10. num. 4.*

8. The

8. The most usual form of Wills and Testaments with us here in *England*, is after this manner. *In the Name of God Amen. The* ... *day of* April 1667. *in the nineteenth year of the Reign of our most Gracious Sovereign Lord King* Charls *the Second of* England, &c. *I* Peter Style *of* B. *in the County of* York *Gent. being sick and weak in body, but of sound and perfect memory, (thanks be to Almighty God for the same) And calling to mind the uncertain state of this transitory life, and that all flesh must yield unto death, when it shall please God to call: and being desirous to settle things in order, do make this my last Will and Testament, wherein is contained my last Will and Testament in manner and form following; revoking, and absolutely unwilling by these Presents, all and every Testament and Testaments, Will and Wills heretofore by me made and declared*

The form of a Testament or last Will.

A special Revocation of a former Will *See the next Ch. p. Num.* 34.

declared either by word or by writing, notwithstanding any promise to the contrary, or Clause derogatory in the same: And this to be taken only for my last Will and Testament, and none other. First, I bequeath my Soul to Almighty God my Maker, and to Jesus Christ my Redeemer, and to the Holy Ghost my Sanctifier; and my Body to the Earth from whence it came, to be buried in such decent and Christian manner, as to my Executors shall be thought meet and convenient, there to rest, until my Soul and Body shall meet again, and be joyned together at the joyful Resurrection, and be made Partakers of the never-fading joys of Immortality, which God in mercy, through the merits of Jesus Christ alone, hath promised and prepared for all those that truly and unfeignedly repent and believe in him. And touching such temporal Estate of Goods, Chattels and Debts, as the Lord hath been pleased, far above my deserts to bestow upon me: I do order, give, be-

bequeath, and dispose the same in manner and forme following. Imprimis, I give and bequeath unto my son Henry Style, when he shall attain the age of one and twenty years, the summe of fourty pounds of lawful money of England, to be paid to him by mine Executors hereafter named. Item, I give and bequeath to my Son Thomas Style fourty pounds of like money, to be paid to him (by my said Executors) when he shall attain the age of one and twenty years. Item, I give, &c. And lastly, I make, constitute, ordain and appoint my dear and wellbeloved Wife Mary Style sole Executrix of this my last Will and Testament, to whom I bequeath all the remainder of my Goods and Chattels, moveable and immoveable, after the satisfaction of my Debts, and payment

Observe the difference between these two Bequests; In the first Case nothing is due till the age of 21 years; but it is otherwise in the second Case for there it may be recovered by the Executors or Administrators of the Child, though he die before the age of 21 years.

of

of the Legacies above by me bequeathed. And to her care and tuition also I leave all my Children, and I do hereby nominate and appoint my said Wife Tutrix to them and every of them, until such time as they shall severally attain their ages of one and twenty years. In witness whereof I have hereunto set my hand and seal, the day and year first above-written.

A clause whereby the tuition of the Testators Children is committed to the Executor.

Peter Style.

9. But no man is tied to observe this, or any other set-form in the making of his Will, for it skills not how it be drawn, so as the Testators meaning can be but found out; neither is it material whether the Testament be written in parchment or paper, or the like stuff apt for writing; nor what Language the same be written in, either Latin, Greek,

Greek, French, or any other Tongue; nor whether the same be written in Secretary, Roman, or Court-hand, or any other hand, so that the same may be but read and understood; nor is it material with what Notes or Characters the same may be made, as XX. s. for twenty shillings, CL. l. for an hundred and fifty pounds, 1590 for one thousand five hundred and ninety, with such like, or the Figure (1) Instead of the Letter A. Or (2) Instead of the Letter B. &c. or some other more strange Characters; yet it is good enough, if the same by any means can be but read and understood, unless the same Writing be but only a Preparation to the Testament, and not the Testament it self: for then in such Case, though the same may be read and understood, yet it is of no force, and the party shall be said to die Intestate. *Michael. Graff. Thesaur. com. opinion. sect. Test. Quest.* 10. *Swin. part.* 4. *sect.*

sect. 25. *numb.* 2, 3, 4, 5, 6. *Justinians Inst. l.* 2. *Tit. de Test. ordinandis numb.* 12.

10. Words and Sentences also are not of necessity required for the form of a Testament, but only for the expressing of the will and meaning of the Testator; and therefore if the Scribe omit some words by Error, whereby the sense is imperfect: As for Example, if he write thus; *I make my Wife my of this my last Will and Testament*, leaving out this word *Executrix*; yet in this Case his Errour shall not hurt, if for the Law doth presume more was spoken, though less was written; and therefore she shall be taken for Executrix. *Swin. part.* 4. *sect.* 25. *numb.* 7. *Molin. in l.* 1. *C. de Test. sect. de verb. ob. numb.* 8. *in fin.*

11. Also if there be no Witnesses of a written Testament, yet if it be certain and undoubted that the Testament is written or subscribed with the Testators own hand, it is suf-

ſufficient; but if it be doubte
whether it is his hand or no, the
the Teſtimony of Witneſſes is ne
ceſſary to confirm the ſame to b
the Teſtators own hand: or whe
there is no ſuſpicion of fraud, proo
may be made and allowed by com
paring of hands with other Wri
tings ſigned by the Teſtator. *Mat
chard. de probat. verb. Teſtament. Con
cluſ. 1352. numb. 60. Swin. part. 4. ſect.
25. numb. 8. Michael. Graff. Theſaur.
com. opinionum, ſect. Inſt. 2. 16.
n. 36.*

12. Having ſpoken of a written
Teſtament, we ſhall now ſhew
what a Nuncupative Teſtament is,
and that is, where the Teſtator by
word of mouth, before a ſufficient
number of Witneſſes, doth declare
his mind, and names his Executor,
and this Teſtament is of as great
force and efficacy as a written Te
ſtament, except where Lands, Te
nements and Hereditaments are de
viſed: and to the making of this

Nun-

Nuncupative Testament no pre-
cise form of words is required, nei-
ther is it material whether the Te-
stator speak properly or unproperly,
so that his meaning do appear, as is
shewed before. It is called *Nun-
cupative a Nuncupando, id est. Nomi-
nando*, of naming an Executor; and
is most commonly made when the
Testator is very sick and weak, and
past all hope of recovery. *Molineus
in l. 1. sect. Test. ordin. ff. de verb. ob.
numb. 8. in fin. Fust. Instit. sect. de
Test. ordinandis in fine. Minsing. in
D. sect. final. Swin. part. 1. sect.
12. & part. 4. sect. 26. Terms
of the Law, verb. devise. Noyes
Maximes, p. 96. Perkins numb.
476.*

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13. If such a Testament be
put in writing after the Te-
stators death, yet it remains a
a Nuncupative Testament still.
*Noyes Maximes, pag. 96. Swin.
part. 1. sect. 11. numb. 2. in
princ.*

14. A

14. A man hath that priviledge in a written Testament, which he cannot have in a Nuncupative Testament; for in a Nuncupative Testament he must publish and declare his minde; but in a written Testament he may seal up his minde, and keep it secret till after his death; only it behoves him to shew the same after it is sealed up to some Witnesses, and say unto them, This is my last Will and Testament, or Herein is contained my last Will; and so let them set their hands to some part thereof, or otherwise to take such special Notes and Marks thereof, as that they be able to prove the Identity of the Writing after the Testators death; and in such Case it is good enough, though none of the Witnesses were privy to the Contents thereof. *Paris. Consil.* 128. *vol.* 3. *numb.* 25, 26, &c. *Maschar. Tract. de Probat. Conclus.* 10. 1352. *numb.* 173. *Clar. sect. Test. Quæst.* 4. *numb.* 3. *Swin.*

Swin. part. 1. sect. 11. numb. 6. 7, 8, 9. Simon. de Praetis. de Interpretat. ult. volan. l. 11. f. 321.

15. As touching priviledged Testaments, there are three sorts thereof; *viz. Testamentum Militare, Testamentum inter liberos, Testamentum ad pias Causas*: That is, a Testament made by a Souldier, a Testament made by a Father amongst his Children, and a Testament made for good and godly uses. Some other there are also, but their priviledges are but small in comparison of these. *Mantica de Conjectur. ult. voluntat. lib. 1. Tit. 57. in fin. Swin. part 1. sect. 13.*

16. As to the first of these, it is observable among the *Civilians*, That a Souldier in Arms, and in actual service of Wars, is not disabled by any of those Impediments whereby others are disabled to make their Testaments, except in Cases of *Furor*, or lack of Reason, and for other causes also when he is disabled

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Jure gentium. And whereas there be divers which be prohibited to be Executors or Legataries to other persons, yet notwithstanding they be Executors or Legataries to a Souldier, except in some few Cases. And whereas also no other person can die with two Testaments, yet a Souldier may, and both Testaments shall be deemed good, according to the will and meaning of the Testator. And likewise whereas another person cannot by the Civil Law die partly Testate, and partly intestate, yet a Souldier may. *Minsing. in Tit. de Milit. Testamen. Instituend. in principio. Fitzh. Abr. Tit. Execut. num. 26. Franc. Mantica de Conject. ult. vol. l. 6. Tit. 1. num. 32. Swin. part. 1. sect. 11. Mich. Graff. Thesaur. com. opin. sect. Testam. Quest. 3. num. 1. Swin. part. 7. sect. 13. num. 6.* holds.

I. As to the Second, where the Father maketh his Testament, and nameth his lawful and natural Children

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dren his Executors, and giveth them the residue of his Goods, to this kind there also belongeth several privileges; for if there be found after the Testators death two Testaments of divers Tenors, and it doth not appear which is first, nor which is last; in this Case the Testament made in favour of the Testators Children shall be deemed the later, and shall take place; whereas if neither be in favour of the Children, nor otherwise privileged, then both are void; except it be in case of a Souldier, who by the Civil Law may die with two Testaments as aforesaid. Also a Testament made in favour of Children is not so easily revoked as other Testaments are: For whereas in other Testaments the former is revoked by the latter, and that *ipso jure*, without any express revocation; yet by the Civil Law a Testament among Children is not revoked by a latter Testament, wher-

in strangers are preferred, unless it be mentioned and reviked by expres words, or unless the later Testament be made *ad pias causas*, or else some great Displeasure or Enmity have happed betwixt the Father and Children, or some like cause have come to pass, whereby it may be made appear, that the Father did repent him of the making of the said Will. And lastly, another priviledge belonging to this Testament is, That if there be no witnesses to prove the same, yet if the Testament be found among other Writings in the Testators Chest, or like place, and undoubtedly appear to be written or subscribed with the Testators own hand, or by him procured to be written by some other, then in such Case it is good enough, but this Priviledge also is allowed to all other Testaments here with us in *England*, as is shewed before in *Num.* II. See the next Chapter,

Num. 33. 40. Clar. sect. Test. Quest. 100. Franc. Marc. de conject. ult. volunt. l. 6. Tit. 2. Swin. part. 1. sect. 14. Mich. Graff Thesaur. communis. opin. sect. Testam. Quest. 86. Num. 11. 218. The third kind of priviledged Testaments, are those which are made to pious uses; as when one gives his Goods to be distributed to poor Orphans, Widows, Strangers, Prisoners, lame and diseased poor persons, or to Hospitals, Churches, repairing of Bridges, or the Walls of a City or Town, when the same be decayed and stand in need of repairing; and to such Testaments belong many priviledges also. As first, it may be written with strange and unaccustomed Characters and Notes, and yet the same shall nevertheless be as effectual, as if the same had been written after the usual and accustomed manner. Also, if such a Testament be found cancelled, and it is not known whether the Testator did wil-

willingly and wittingly cancel the same or no; in this Case it shall be presumed to have been cancelled unadvisedly, and shall take effect notwithstanding, as if it had not been cancelled at all: whereas in other Testaments the contrary is presumed. And another Priviledge is, That such a Testament is not void for incertainty (as other Testaments are;) and therefore if the Testator say, *I make the Poor my Executors*; or, *I will that my Goods be distributed amongst the Poor*; such manner of appointing Executors of Legacies is good. Also if there be two Testaments found of divers Tenors, and it doth not appear which is last; in this Case if one of them be made *ad pias causas*, that shall be presumed to be last made, and take effect, unless the other Testament be *inter liberos* and then that shall be deemed last, and not the Testament *ad pias causas*. There are several other priviledge

viledges reckoned up by some Authors to belong to this kind of Testament; for *Tiraquel. in Tract. de Privilegia pia causæ*, reckons up 170 Priviledges belonging to such a Testament; but most of them are here in *England* allowed to all Testaments, though they be not made *ad pias causas*. *Franc. Mantic. de conject. ult. voluntat. l. 6. Tit. 3. num. 3. & 43. & l. 12. num. 30. Tit. 1. & Tit. 2. num. 25, 32. Swin. part. 1. sect. 16. & part. 7. sect. 8. num. 8. & sect. 16. in fin. Tiraquel. de privilegia pie causæ. c. 12, 16. & 56.*

19. Unpriviledged Testaments are those which have not any freedom or benefit contrary to the common course of ordinary Law, but are tied to such observations as the Law requireth, and hath appointed regularly for all Testaments. *Swin. part. 1. sect. 17.*

20. Now having spoken something of *Testaments Solemn* and *Unsolemn*, *Written* and *Unwritten*, *Priviledged*

viledged and *Unpriviledged*; I shall speak a word or two of *Wills* and *Codicils*, and so conclude this Chapter.

21. The definition of a Last Will differeth but little from that of a Testament; for a Last Will is thus defined, *Ultima voluntas est legitima dispositio, de eo quod quis post mortem fieri velit*, A Last Will is a lawful disposing of that, which any one would have done after death. *Eranc. Mantica de conject. ult. voluntat. l. 1. Tit. 4. num. 10. Swin. part. 1. sect. 4.*

22. There is also another kind of Will called a *Codicil*, and is defined after this manner, *Codicillus est voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit absque Executoris constitutione.* A Codicil is a just Sentence of our Will, touching that which any one would have done after his death, without the appointing of an Executor; by force of which

last

last words a Codicil is made to differ from a Testament; for a Testament can no more consist or be without an Executor, then a Codicil can admit of an Executor. *Swin. part 1 sect. 5. num. 2. Franc. Marsica de conject. ult. voluntat. l. 1. Tit. 8. num. Justinians Inst. l. 2. Tit. de Codicillis num. 2.*

23. These Codicils are most commonly made by the *Testator*, after he hath made his Testament, wherein he hath forgotten something which he hath a mind to put in; and then it is done by way of Codicil, and annexed to the Testament: but whether it be made before or after the Testament, it is to be taken and reputed for parcel thereof, and ought to be performed as well as the Testament, unless being made before the Testament, it appear to be revoked in the Testament, or be contrary to that which is contained in the Testament. *Reformatio Legum Ecclesiasti-*

cum Tit. de Teſtam. cap. 5. Swin. part. 1. ſect. 5. num. 11. Juſtin. Inſt. l. 2. Tit. de Codicillis, num. 1. Vigel. method. Jur. Civilis, part. 4. l. 9. c. 23. in principio.

24. When a Codicil is made by one that dieth Inteſtate, the Legacies therein given muſt be paid by him that hath the Adminiſtration of the Goods of the Deceaſed, as if he were Executor. *Bro. Abra. Tit. Deviſ. num. 35. Swinbur. part. 1. ſect. 5. num. 10.*

25. In ſome reſpect Codicils and Teſtaments are quite contrary to one another; for whereas a man cannot die with two Teſtaments, (becauſe the latter doth always infringe the former, except in ſome ſpecial Caſes) yet a man may die with divers Codicils, and the latter doth not hinder the former, ſo long as they be not contrary to one another. Alſo where two Teſtaments are found, and it doth not appear which was firſt, nor which

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is last; in this Case they are both void, except in special Cases, as is shewed before, *Numb.* 17. & 18. But if two Codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one Codicil, and to another person in another Codicil; here the Codicils are not void, but the persons therein named ought to divide that thing betwixt them by the Civil Law. *Michael. Graff. Thesaur. commun. opinion. sect. Codicillus. Swin. part. 1. sect. 5. in fine.*

CHAP. II.

What shall be a good Testament or Will, and what not.

26. THat Wills and Testaments may lawfully appear, it is necessary that there be sufficient proof, either by writing or by wit-

neſs; and as to that know, that two Witneſſes are ſufficient, if they be without lawful exception. *Cowells Inſt. p.* 118. *Waterhouſe on Forteſc. fol.* 350. *Glan. l.* 7. *c.* 6. *Bract. l.* 3. *c.* 16. *Swin. part.* 4. *ſect.* 21. *numb.* 2.

27. That is, if they be not perjured perſons, or perſons of infamous life, as Malefactors, or Law-breakers; or Children, Idiots, Lunatick perſons; or of the Kindred or Alliance, or Tenants or Servants to the party producing them, or Capital Enemies to the party againſt whom they are produced, or perſons who are to reap benefit by their depoſitions, or ſuch like, *&c. Cowel on Litt. fol.* 6. *Swin. part* 4. *ſect.* 21. *Maſchard. de probat. verb. princ. Concluſio* 1168. *& verb. Criminoſus, Concluſ.* 469. *& verb. Furioſus Concluſ.* 828. *Swin. part* 4. *ſect.* 21. *numb.* 7. 8, 9, 10. *Ref. Legum Eccleſ. Tit. de Teſtamentis, c.* 17. *Waterhouſe in Forteſcue, fol.* 357. & 358.

28. But

28. But if the exceptions be but small, and such as do but in part diminish the Witnesses credit, as the exception of friendship, household-servant, or suspition of some small fault, then the number may supply the defect; and so the Testimony of three or four Witnesses, not altogether clear from those exceptions, is as good as the Testimony of two Witnesses without all exception. *Franc. Mantica de Conject. ult. volunt. l. 6. Tit. 3. numb. 8. Swin. part 4. sect. 21. numb. 3.*

29. And sometimes the Testimony of one Witness is sufficient; as where the Testator in his lifetime commits something in secret to some one person (being loth perhaps that any other should know it) and willeth that that same person shall be credited for the Declaration of his Will; in such case that person alone is sufficient to prove the Contents of

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the last Will and Testament of the person deceased. *Oldend. de Probation. fol. 286. b. Swin. part. 4. sect. 21. numb. 4.*

30. The Testimony of a Legatary also is allowed in probate of Wills, but not for his or their own Legacies, but for all the rest of the Will it is good enough. *Justin. Inst. l. 2. Tit. de Test. ordinan. num. 11. Swin. part. 4. sect. 21. numb. 11. Porcins in defect. Legatar.*

31. But note, if a man in perfect health be demanded, who shall be his Executor, or have his goods after his death (which question is very familiar and common amongst companions) and forthwith he names some person, to whom he saith he will leave his goods after his death; This is not to be taken for a Testament, or last Will, neither is that person named to be admitted Executor, nor to have his goods, unless it be proved that the Testator at the time when the

words

words were spoken had *Animum Testandi*, that is to say, a full mind and resolute purpose at that time to make his Testament or last Will; and this purpose must be proved by circumstances as well as by words; as that he framed himself very seriously to the making of the same, desiring them that were present to bear Witness of his Will, *&c. Just. Inst. l.* 2. *Tit. de Milit. Testamento. numb.* 1. *Swin. part.* 1. *sect.* 3. *numb.* 24. *Menoch. de Arbitrio Judicis, c.* 496.

32. Note, that the last Testament doth always make void the first, except in some special cases, as where the latter is made through just fear, or by cunning and deceitful fraud or flattery, or at the importunate request and desire of another person, who expects to reap benefit thereby, especially if the Testator be very sick at such time, and do it to be at quiet and rest; in these cases the latter Testament shall not make void the former, but

the

there must be Witnesses to prove these things, if the parties concerned intend to make void the latter Testament. *Menoch. de Arbitrio Jud. c.395. numb.41. Socin. Jun. Consil.14.& 148. vol.2. numb.15. Simo. de Præsi. de Interpret. ult. voluntat. l.4. fol. 226. numb.49. Swin. part 7. sect.3. Numb.1. sect.4. numb.3.& 6.& sect.14. numb.3.& 5. Paris. Consil.10. l.3. numb.4. Noyes Max. p.97.*

33. Also if the Testator have made his Will, wherein he hath bequeathed several Legacies to his own Children, or to his Brothers, and afterwards makes another Will in favour of other persons; this last Will shall not revoke this first, without express words of revocation of the first Will, as is shewed before in the first Chapter. *Numb.17. Mich.2 Car.1. Eyres and Eyres Case in Chancery, Cro.1. part Rep. fo. Swin. part 1. sect.15. num.5.*

34. But in other Wills and Testaments,

staments, the latter doth make void the former; albeit the first were a written Will or Testament, and the latter but a Nuncupative one, or that there were twenty Witnesses to the first, and but two to the second; and that *ipso jure*, although there be no mention in the second Testament of revoking the former; unless there be a Clause Derogatory in the former Testament: as where the Testator saith in the first, *If I make any Testament hereafter, I will that the same shall be of no force*; then in such Case it is most safe and convenient in the latter Testament to revoke the first, by saying, *I make this last Will and Testament, Notwithstanding that Clause Derogatory in my former, whereby I would that no Will or Testament afterward to be made by me should be of any force.* *Vasq. de succes. Resolut. lib.* 1. *sect.* 1. *numb.* 26. *Pasc.* 14 *Eliz. Dyer fol.* 310. *Mich. Grass.*

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Thesaurus com. apin. sect. Testam. Quest. 99. *num.* 4, 5. *Swin. part* 7. *sect.* 14. *num.* 4. 11, 12, 13, 14, 15, 16, 17, 18. *Perk. num.* 478. *Paul de Cast. Consil.* 206. *Vol.* 1.

35. Also where the Testator hath made two Testaments, a former and a latter, and afterwards lying sick, they are both brought unto him, and being desired to shew which he intends shall stand, and he saith, that the first should be his last Will, or if he take that of the first date, and deliver it for his last Will; then in such Case that Will shall stand, and the other shall be void. *Perkins num.* 479. *Mich.* 44 *E.* 3. *fol.* 33. *Paris Consultum, pag.* 81.

36. Likewise if an Executor be named in the first Testament, and none in the second Will, then the first Testament shall stand, and the latter shall be added only by way of Codicil. *Vigel. Method. Iur. Civilis part.* 4. *l.* 9. *c.* 23. *in princip.*

Swin.

Swinb. part 7. sect. 14. num. 5.

37. Where it is said before, that where Lands are devised, the Will must be in writing, and done in the life-time of the Testator; yet if the Clerk be skilful in the Law, and takes Notes from the mouth of the Testator, for the devise of Lands, Tenements and Hereditaments, and afterwards proceeds to write the same in form; but before it be finished or shewed to the Testator, he departs this life; yet this is held and adjudged a good Will in writing, within the Statute of 32 H. 8. to convey Lands, Tenements, or Hereditaments. *Mich. 6 E. 6. Sackvil and Brown's Case, Dyer fol. 72.*

38. Also a written Will done in the life-time of the Testator, or by Notes as aboveſaid, is good to convey Lands, though it be unseal-ed or unsubscribed, nor no Execu-tor named therein; and such a Will which only concerns the bequeath-ing of Lands, Tenements or Here-ditaments,

ditaments ought to be proved in the Chancery. *Hill.* 22. *Car.* 1. *Pasch.* 23. *Car.* 1. *B.R. Styles Reges Practicale, p.* 357. *Pacis Consultum p.* 80. *Noyes Maxims p.* 97.

39. If the Testator after he had begun his Will, and before he have finished, be suddenly stricken with death or insanity of mind, or some other impediment, so that he cannot finish the same; or if he have begun the same, and deferred the finishing thereof till some other time, and in the mean time dieth, or otherwise becometh Intestate: In these Cases, though it seem by the Civil Law that such Testaments are void wholly; yet by the Law of Nations, and with us here in *England*, such Testaments are good for so much as is therein already bequeathed. *Michael. Grass. Thesaur. com. opinion. sect. Testament. Quest.* 12. & 19. *Mascha. de Proba. verb. Testa. Conclus.* 1352. *numb.* 70. *Swin. part.* 7.

sect.

sect. 12. numb. 4. 9. and 10. Pacis Consul. pag. 81. Simo. de Pratis. de interp. ult. voluntat. lib. 1. fol. 95.

40. If there be two Testaments found, and it cannot be known which of them was first made, nor which was last made; in this Case they are both void, unless one of them be made in favour of the Testators children, or those who after his death are of right to have Administration of his Goods, if he had died Intestate, and the other Testament made in favor of Strangers, and then in such Case the Testament made in favour of the Children or Friends, &c. shall prevail and stand good, as is shewed before in the first Chapter. *Num. 17. Frant. Mantica de conject. ult. volunt. l. 2. tit. 15. num. 17. Swin. part 1. sect. 15. num. 2. & part 7. sect. 11. num. 2.*

41. Or if one of the Testaments be made *Ad pias causas*, and the other

other not, then the Testament *ad pias causas* shall prevail, unless the other be *inter liberos* amongst the Testators Children, and then shall prevail, and not the Testament *ad pias causas*, as is shewed before in the first Chapter, *Num.* 18. *Francis. Mantica de conjectura ult. volunt. l.* 6. *Tit.* 3. *num.* 43. *Swin. part.* 1. *sect.* 16. *num.* 7. *& part* 7. *sect.* 11. *num.* 6.

42. Also where there are two Testaments, and one of them is proved before the Ordinary, *&c.* and the Executors are entred to the possession of the Goods, and then the other Testament is found, and it cannot be known which was first made, nor which was last made, in this Case the Testament already proved shall stand, and the Executors shall not be dispossessed of the Goods, by means of the other Testament of the same date. *Sichar. in D. lib. ult. Swin. part.* 7. *sect.* 11. *num.* 4.

43. If

43. If a man be so extreme sick, that he is almost at the point of death, and can scarce speak, yet if he be of good understanding and sound mind, as may appear by his Gestures and sensible Speeches, in such Case he may make his Testament, so as it come of his own accord, and not at the earnest request or importunity of his wife, or some covetous person who expects and gredies after benefit by the same. *Franc. Mantica de conject. ult. volunt. l. 2. Tit. 6. num. 5, 9. & 10. Sacin. Jun. Consil. 183. vol. 2. num. 27, 31, 34, and 39. Mich. 1654. B. R. Hatsher & Newborns Case. Styl. Regist. Practicale. p. 359. Swin. part 2. sect. 25. num. 2. 5, 6, & 7. Simo. de Pratis. de Interp. ult. volunt. l. 2. Dub. ult. Solut. 4.*

44. If the friends of such a sick man, or any other persons, do without his knowledge prepare a Will in writing, and bring it to him, and read it, and ask him if that shall stand for his Testament, and

he answers, *Yea*, and immediately after dieth; in this Case such Testament is not good, unless the Testator had first uttered his mind to the Writer or Inditer thereof, or had requested them to write his Will; or unless the Testator, being of perfect mind and memory, had by plain and express words, or other apparent conjectures, confirmed the same, and not only by answering, *Yea*. *Franc. Mantica de conject. ult. volunt. l. 2. Tit. 6. num.* 10. *Swin. part* 2. *sect.* 25. *num.* 11. *Gabr. l.* 4. *commun. conclus. Tit. de Testam. conclus.* 2. *num.* 13. *&* 17.

45. If a man through just fear and constraint of some other person, do make a Testament, such a Testament is void, especially when afterwards the Testator declareth, *That he would gladly alter his Testament, but for fear of such a person*; and then such a Testament is void, at least, as to such a person by him named, of whom he is afraid.

Mich.

Mich. Graff. The saur. com. opin. sect. Testament. Quest. 32. num. Swin. part 7. sect. 2. numb. 9. & 10.

46. But here it is left to the discretion of the Judge, who ought not only to consider the quality of the threatning, but also the persons as well threatned as threatning; and in the persons threatned, the Sex, the Age, or Courage, or Pusillanimity; and in the person threatning, the power, the disposition, and whether he be a meer Boaster, or Performer of his threats. *Menoch. de Arbit. Judic. Casus 135. Masthar. de Probat. Conclus. 1054. Swin. part 7. sect. 2. numb. 7.*

47. Also a Testament made by fraud is void, unless the deceit of fraud be very small, such as would not deceive any rational man or woman, or that the fraud be not evil, as where the Testator, intending to bestow all his goods on some vile person, omitting his honest Wife and Children;

here if the Wife and Children d
perswade him that such person
dead, or by some means deceiv
the Testator, and procure them
selves to be made Executors, th
this is not to be repelled as an un
lawful Testament. *Bald. in d.*
lib. 1. numb. 17. Swin. part 7. sect. 9
num. 2.

48. Though a man have sworn no
to make a Testament, yet notwith
standing he may lawfully mak
one, and if he have made one, an
sworn not to Revoke it, yet he ma
afterwards make another, an
revoke the first: but then it is con
venient, that he revoke his Oath al
and say, I make this my last will &
Testament, notwithanding my for
mer Testament, with the Oat
therein contained not to revoke th
same. *Mich. Grass. Thesaur. com.*
pin. sect. Testam. Quaestio 87.
Clar. sect. Testament. Quaestio 9
Swin. part 2. sect. 24.

49. It is necessary to the vu
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cy of a Testament, that the Testator have ability to make a Testament, not only at the time of the making thereof, when the Testament receiveth his essence or being, but also at the time of the Testators death, when the Testament receiveth his strength and confirmation: And therefore if a woman make her Testament, and then marry, and die during marriage, such Testament is void; or if she make a Testament during marriage, and overlive her husband, and then die, yet the Testament is void: but if she make her Testament before marriage, and overlive her Husband, and then die, in such case the Testament is good; or if it were made during marriage, and after her Husbands death, she doth approve and confirm the same, and then die, in such Case also it is held to be good. *Plo. Com. fol.* 343. 37. *Eliz. C. B. Forse & Hemlings Case, Co.* 4. *lib.*

lib. Rep. fol. 60. Swin. part. 2. sect. 9. num. 4, 5, 6.

50. A Codicil may be added by Parol to a Will in writing, and this Parol Codicil shall be put in writing, and affixed to the Will as a Codicil, and this may as well be done, as a Will in writing may be revoked by Parol. *Hill. 22 Car. 1. & Pasch. 23 Car. 1. in B. R. Styles Regist. Practicale, p. 357. & Pasch. 14. Eliz. Dyer fol. 310.*

51. If the Testator make his Will by Parol, which is afterwards put by another into writing, and he put more in then the Testator did express; yet it is good, as to so much as can be proved was expressed by the Testator by Parol, and the rest is void. *Pasch. 24 Car. 1. B. R. Styles Regist. Practicale. p. 357.*

52. One went beyond Sea, and wrote back a Letter that his Land should go in such a manner, and it was adjudged to be a good Will

and

and Devise of his Land. *Abr. Moors Rep. p. 63. pl. 299. Wests Case.*

53. If the Testator being of sane Memory, desire another person to set his Hand and Seal to his Will for Him, and he does so; this is a good Will, though the Testator did it not himself. *Pasch* 1650. *B. R. Styles Regist. Practicale p.* 358.

54. If a Parol will be put in writing, and is afterwards embezeled, lost or destroyed; yet the Will is not thereby destroyed, if it can be proved by Witnesses; but if it come in question, whether a Will be good or not, in such Case proof doth not avail, for matter of Law is to be decided by the Judges, and not by Witnesses nor Juries. *Ad quæstionem Facti non respondent Judices: Ad quæstionem Juris non respondent Juratores. Hill.* 22 *Car.* I. *Pasch.* 24. *Car.* I. *B. R. Styles Regist. pract. p.* 357, 358. *Cowel on Lit. fol.* 155. *b.*

55. If a Testament bear date at *Cane* in *Normandy*, and be proved in *England*, it is good enough for the Executor to bring an Action upon. *Perkins, numb.* 494.

56. Note, that a man may die partly Testate, and partly Intestate by the Laws of this Realm, though its contrary to the Civil Law: and this he may do, not only in respect of time, but also in respect of goods and place: for if a man have goods in divers Dioceses, he may make Executors of his goods in one Diocese, and die Intestate as touching his goods in another Diocese; or if a man make one Executor, particularly of a certain portion of his goods, the Executor is only so far chargeable with the paiment of the Debts and Legacies of the Testators, as the portion of the goods to him allotted do extend unto; and as touching the residue of the Testators goods, if there be not another Executor appointed, then for

such goods he is said to die Intestate, and Administration may be taken of them. *Bro. Executor. numb.* 2. & 154. *F. N. B. numb.* 26. *cod. Tit. Plo. Co. fol. In Fox and Grieskies Case. Swin. part* 4. *sect.* 18. *numb.* 4.

CHAP. III.

Who may make a Testament, and who not.

57. Every person, both man and woman, Christian and Jew, sound or sick, and generally of what Estate or Condition soever he or she be of, hath full power and liberty to make a Testament, or last Will, and may therein dispose of their Goods and Chattels; saving such persons as be prohibited by Law or Custom, as hereafter followeth. *Mich. Graff. Thesaur. com. opin. sect. Testam. Quæst.* 20. *numb.* 1. *Swin. part* 2. *sect.* 1. *numb.* 1.

58. By the Stat. 34 *H.* 8. Wills or Testaments made by any person within the Age of twenty one years,

of any Mannors, Lands, Tenements or other Hereditaments, is not good nor effectual in the Law; for till that Age, by the Common Law of this Realm, they are accounted Infants. 34, 35 *H.* 8. *c.* 5. *Wingate Abr. Stat. Tit. Will. numb.* 22. *Dr. & Stud. l.* 1. *c.* 21. *& l.* 2. *c.* 28. *Swin. part* 2. *sect.* 2. *num.* 1.

9. But a Boy of fourteen, and a Girl at twelve years of Age, by the Civil Law, may make their Wills and Testaments of their Goods and Chattels; and that not only without the authority or consent of their Curator or Guardian, but also without the authority and consent of their Parents; and though it be made but in the very last day of fourteen or twelve years, yet it is good enough; but before that age it is not good, although the Boy were a Souldier, or that the Testament were made *ad. pias causas*, or with consent or authority of the Tutor. *Mich. Graff. Thesaur.*

saur. cum. opinion. sect. Testament. Quæstio 20. Perkins, numb. 503. Lamb. Instit. p. 122. Swinb. part 2. sect. 2. num. 6, 7, 8. Noyes Max. 497.

60. Mad folks and lunatick persons, during the time of their *Furor* or insanity of mind, cannot make a Testament, nor dispose any thing by Will, no not *ad pias causas*; nay, though they come to their perfect understanding afterwards; yet this doth not make the Testament to take any effect, which was made during such *Furor*: but if these mad or lunatick persons have clear or calm intermissions, then during such time, they may make their Testament, and appoint Executors, and dispose of their Goods at their pleasure; and the *Furor* going before the making of such Testament shall not prejudice it. *Reformat. Leg. Ecclesiastic. Tit. de Testament. cap. 7. Pacis consultum p. 80.*

Mich. Graff. Thesaur. com. opin. sect. Testam. Quest. 2. 17. Swin. part 2. sect. 3.

61. Also if a man of sound memory, who was never taken with any Lunacy or Insanity of mind, do make his Testament of his Goods or Lands, and afterwards is taken with Lunacy or Insanity of mind, a little before his death, (which often happens through the extremity of their sickness) yet this doth not hurt the Testament which was made before. or if a lunatick person, or one that is besides himself sometimes, make his Testament, and it is not known whether the same were made when he was of sound mind or no; in this Case, if no Argument of Frenzy or Folly appear in the same, then it shall be conceived to be made in his calm Fit, and so adjudged a good Testament. But on the contrary, if any Folly appear in the same, though it be but two or three words,

words, as if he say, *I Peter*, when his name is *John*; then it makes the Testament void, as being presumed to be made during the insanity of mind. *Mich. Graff. Thesaur. com. opin. sect. Testam. Quæst. 21. Vasq. de succes. progres. lib. 1. sect. 1. num. 90.* See *Co. 4. lib. 1. Rep. fol. 61. Swin. part 2. sect. 3. num. 4. 14, & 15.*

1062. Note, that every person is presumed to be of sound mind, unless the contrary be proved; and therefore those that intend to make void a Testament by reason of insanity of mind, must prove the same impediment; and if it be proved that the Testator was beside himself before the making of the Testament, although they do not prove him to be mad at the very time of making the Testament, yet it is sufficient, and it lies on the Executors part to prove that the Testator was of sound mind, not only to answer to ordinary and u-

sual questions, but that he had a disposing memory, and was able to make his Devises and Bequests with understanding and reason, at the time of making his Testament. *Francisc. Mantica de conject. ult. volunt. l. 1. Tit. 5. Maschard. de Probat. verb. Furiosum, Conclus. 824. numb. 10. Vide 41 Eliz. B. R. in Marquess de Winchester's Ca. Co. 6. Lr. fo. 23. Swin. part. 2. Sect. 3. Num. 6, 7.*

63. An Idiot or Natural Fool, that cannot number Twenty, nor tell his Age, nor is able to answer to any ordinary and usual Question, nor knows what is for his advantage or damage, though it be notorious, nor is apt to be instructed or informed by any other; such an one cannot make a Testament, nor may dispose either of his Lands or Goods. *F. N. B. de Idiota inquirendo. 34 H. 8. c. 5. Cowels Inst. p. 123. Simo. de Pratis. de Interp. ult. volunt. lib. 2. dub. 1.*

fol.

fol. 4. Swin. part 2. sect. 4. num. 1, 2.

64. But if a man be of a mean understanding, between a Wise-man and a Fool, such an one may make his Testament; unless he be so simple as that one may perswade him to believe things impossible, as that an Ass can flie, or that in old time Trees did walk, and Birds speak, or the like. Simo. de Pratis. de Interp. ult. volunt. lib. 2. dub. 1. fol. 4. Swin. part 2. sect. 4. num. 3, 4.

65. A married woman cannot make her Testament of any Manners, Lands, Tenements or Hereditaments, by the Statute of 34 H. 8. neither can she make a Testament of Goods or Chattels without her Husbands license; except she be a Queen or Empress, or that she were Executrix to some other person: for in such case she may make her Will of such Goods as she hath as Executrix, without his license; and name her Executor, who shall have them to the use of the first

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Teſtator, but ſhe cannot give them away as a Legacie; and if ſhe die without Will, yet in ſuch caſe, ſuch goods as ſhe had as Executrix, (of which the property is not altered) ſhall not go to the Husband, but Adminiſtration thereof ſhall be committed to the next of kin of the firſt Teſtator. But in both theſe caſes, the Husband ſhall have the Profits ariſing of the ſame, as Calves, Lambs, and ſuch-like profit of Kine and Sheep. Alſo if the Wife have Goods by way of Legacie from another perſon, in ſuch caſe ſhe cannot make a Teſtament, or diſpoſe of the ſame, without his Licence. Note, though the Husband do give Licence to the Wife to give away part of his goods, yet notwithſtanding he may countermand her Teſtament again, either before or after her death, or at leaſt before the Probate thereof. But if the wife make her Teſtament of his Goods, and the Executors prove

the

the same, and the Husband delivers the goods to the Executors; then he cannot countermand the Testament, though the wife made it without his licence or knowledge: for by this after-act the Law presumes he gave consent at the first. 34, 35 H. 8. ca. 5. *Bract. l. 2. c. 26. Brac. Deuise* 34. *Testament* 21. *Executor* 11. *& Administrator* 45. *Perkins num.* 501. *& 502. Noyes Maxims p.* 97. *Mich. 2 E. 2. Deuise* 14. *F. N. B. tit. Executor. num.* 10. *Swin. part 2. f. & 9. Plo. com. fol.* 325. *Cowels Inst. p.* 124.

66. A Slave or Bondman cannot make a Testament or Will, for that all he hath is his Lords, and he can dispose of nothing. *Bract. l. 1. c. 9. num 3. Fleta l. 1. c. 5. sect. 7. num. 3. & Cowels Inst. p.* 16.

67. But if a Villain make a Testament, it is not absolutely void, but voidable: for if the Lord enter, and seise the Villains Lands and Goods before Probate of the Will,

Will, it makes the Deviſe void; or if he claim the Villain in his life-time, and ſeize the Goods by word only, it makes the Deviſe void. But if neither of theſe were done by the Lord, before the Executors prove the Will and ſeize the goods, then the Teſtament of the Villain is good in law againſt the Lord; except it be in caſe of the King; for if his Villain give or ſell his Goods, the King may ſeize them at any time; for, *Nullum tempus occurrit Regi.* Alſo if a Villain have Goods as Executor to another perſon, he may make a Teſtament thereof, and appoint an Executor to the firſt Teſtator, who ſhall have the ſaid Goods, and not the Lord of the Villain. *Bract. lib. Villenage* 50, 68, 73. *Dr. & Stud. l. 2. c.* 43. *Littletons Tenures, l. 2. c.* 11. *& Swin. part* 2. *ſect* 27.

68. A man that is taken captive by thoſe who are open enemies to the King, cannot make a Teſtament during

during his captivity: for if he do, though he should escape afterwards, and then die, yet such Testament is void: but if he had made a Testament before he was taken, and then afterwards escape, or though he die during his captivity, yet in both cases the Testament is good; and so it is if he be taken by those who are not proclaimed enemies, and during his captivity he makes his Testament: or if a man who is imprisoned for Debt, do make his Testament during his imprisonment, it is good, unless it be made in favour of those at whose Suit he is imprisoned. *Mich. Graff. Thesaur. com. opin. sect. Testament. Quæstio 25. Francisc. Mantica de conject. ult. Volunt. lib. 2. tit. 7. num. 2. & Bract. lib. 2. cap. 16. numb. 5. Swinborn. part 2. sect. 8.*

69. One that is born deaf and dumb, if it appear by sufficient Argument that he understands

what

what a Testament is, may by signes make a Testament; and so may any one that could have spoken and heard formerly, and is become deaf and dumb by some accident: or if such person can write, then he may write his Testament with his own hand; and so likewise may one do that can hear, but cannot speak: and if he cannot write, then he may do it by signes and tokens; and one that can speak, but cannot hear, may also make his Testament, and devise his goods to whom he pleases. *Refor. leg. Eccles. tit. de Testam. c. 7. Swin. part 1. sect. 10.*

70. But one that is born both deaf, dumb and blinde, cannot make a Testament or Will, because he hath no understanding. *Kinchin's law, l. 2. c. 2. pag. 103. Perkins, num. 25.*

71. One that is blind, may make a Nuncupative Testament, by declaring his Will before a sufficient num-

number of Witnesses; but he cannot make his Testament in writing, unless the same be read before Witnesses, and then acknowledged by him to be his last Will and Testament: for if he should acknowledge a Writing for his last Will, and do not hear it read, this will not make it amount to a Will in writing. *Swin. part 2. sect. 11. & num. 1, 2.*

72. He who is lawfully convicted of High-Treason, by Verdict, Confession, Out'awry or Presentment, cannot make his Testament, or dispose of any Goods, Lands, Tenements or Hereditaments; nay, though he have made a Testament before such conviction, yet the same is void: but if he afterwards obtain the *Kings* Pardon, then he may make a Testament; or if he have made one before conviction, then after such pardon the same becomes good again. *Cowels Inst. p. 113. 5 E. 6. c. 11. Swin. part 2. sect. 12.*

73. He

73. He who is indicted of Felony at the Kings suit, and will not plead to the Indictment, but stand Mute, shall be pressed to death, and forfeits all his Goods, but not his Lands; and so it is said he may in such case make his Testament of his Lands. *Swin. part 2. sect. 13. num. 5. Dr. & Stud. l. 2. c. 41. Pulton de Pace Regis, fo. 216.*

74. Those who are indicted and lawfully convicted of such Crimes as are Felony, (as petty Treason, Murder, Homicide, Chancemedly, Burglary, Robbery, Theft, Buggery, Rape, &c.) after their conviction can make no Testament, nor dispose of any Lands, Goods or Chattels of their own; nay, if they have made a Testament before, such conviction makes it void, unless they procure the Kings Pardon, and be restored to their first condition again; but if one be attainted of Felony only, he may give away his Goods by Deed of Gift,

Gift, or sell them, before Judgment be pronounced; but for Lands, the Law takes notice from the time of the Fact committed and comprised in the Indictment, but it is otherwise in case of Goods and Chattels. *Mich. Graff. Thesaur. com. opin. sect. Testament, Quæstio 26. Dr. & Stud. lib. 2. c. 41. Bro. Forfeiture, 5. 28, 65, 89, 103, 113, 117. Swin. part 2. sect. 13. Stamf. 192. 33 E. 3. tit. 20. Perkins num. 29. 41. Ass. pl. 31. Cowels Inst. p. 123. & 124. Dalton fo. 292. c. 110. Vide Cy. on Lit. sect. 745. Rastal. Forfeiture 7. Wingate Abr. Stat. tod. titulo, num. 5. & 8. Stat. de catallis Felonum, & 1 R. 3. c. 3. Pasch. 8 E. 4. fo. 4. a. Kitch. Court-leet f. 42. a.*

75. By our ancient Law, an Heretick could not make a Testament (after conviction) of his goods and chattels; and if he were delivered over to Lay-mens hands, then he forfeits his Lands also.

But

But see now the Statute of 1 *Eliz.* c. 1. for by that Statute 2 *H.* 5. c. 7. which gave forfeiture of goods and lands in case of heresie, stands not repealed; so that we have nothing in certain now, but what we receive from the Canon-law. A Relapse into Heresie after Recantation is fatal. *Joh. Graff. Thesaur. tom. 1. pin. sect. Testam. Quæst. 22. Cowel Inst. p. 124. Swin. part 2. sect. 14. Dr. & Stud. l. 2. c. 29. 2 H. 5. c. 7. 1 Eliz. c. 1. Co. 3 part. Inst. fol. 43. c. Heresie. Reformatio Leg. Ecclesiasticum, tit. de Test. c. 7.*

76. He who hath been condemned, or publickly confessed himself to be a manifest Usurer, and publickly uses the same Trade, and hath exacted above ten pounds in the Hundred, for the loan or forbearance of an hundred pounds for one year, cannot make a Testament of his Goods and Chattels, unless he satisfie or make restitution for the same in his life-time, or enter caution

caution for satisfaction to be made after his death. *Menoch. de Arbit. Judic. l. 2. casus 235. Swin. part 2. sect. 26. Plat. l. 2. c. 50. Com. Inst. p. 124. Mich. Graff. the. var. com. opin. sect. Testament. quest. 33. 13 Eliz. c. 8. Refor. Leg. Eccles. tit. de Testamentis, c. 7.*

77. If one make a Testament of his goods or cattel, and afterwards wittingly and willingly kill or hang himself, then such Testament is void; for his goods and chattels real and personal are all forfeited to the *King*, and all debts due to him by Specialty, but no debts due to him without Specialty, or upon simple Contract. *Stamf. pl. Coronæ l. 1. c. 3. Bract. l. 3. c. 2. Camels Inst. p. 124. Swin. part 2. sect. 29. Co. 3 part Institu. fo. 54. 3 E. 3. Coron. 301. 8 E. 2. Coron. 430. Pasch. 8 E. 4. fo. 4. a. Dyer fo. 262. Datons Just. fo. 236. c. 92.*

78. If one who is outlawed in a personal Action, make his Testa-

ment

ment of his Goods, and the Executors prove the Testament, and afterwards sue the Debtors of the Testator, who plead Outlawry in the Testator as a Bar; this hath been held as no good Bar, so that before seisure they may sue: but if the *King* seize the goods as forfeited, though he give them back again to the Executors, yet they shall not be Assets in their hands to charge them with any debts or Legacies of the Testators. *Trin. 37 Eliz. C. B. Rot. 1306. Woolly and Bradwels case. Brownlows 1 part Rep. fo. 55. Mich. 20 Jac. C. B. Ballen and Gervise case. Hutton Rep. fol. 53. Dr. & Stud. lib. 1. cap. 6.*

79. He who is so excessively overcome with drink, as that he is utterly deprived of the use of Reason and Understanding, at such time cannot make a Testament: but if he be not clean spent, albeit his Understanding be a little darkned

and

and obscured, and his Memory troubled, yet he may make his Testament in that case. *Simo. de Prat. de inter. ult. Volunt. l. 2. dubium* 1. *solut. 4. num.* 22. *Swin. part* 2. *sect.* 6.

80. Archbishops, Bishops, Deans, Archdeacons, Prebendaries, Parsons Vicars, and other Ecclesiastical Ministers or Clergie-men, may make their Testaments of all such goods and chattels as they severally enjoy in their own Right, and not in the right of their Churches and Ecclesiastical Livings. *Perkins num.* 496, 497, 498. 28 *H.* 8. *c.* 11. *Mich. Graff. thes. com. opin. sect. Testam. quæst.* 34. *Cowels Inst. p.* 125. *Swin. part* 2. *sect.* 26. *Dr. & Stud. l.* 2. *c.* 39.

81. The King, however in a capacity to make a Will, cannot make a Testament, and thereby give away his Kingdom and Crown-Jewels or *Regalia*, from his lawful Heirs to another. *Fitz. Abr. Devise* 5. *Ex.* 108. *Cowels Inst. p.* 125. *Swin. part* 2. *sect.* 27.

82. The

82. The Queen of *England* is an exempt person from the King, and may make a Testament; and is of ability and capacity to grant and to take, to sue and be sued, as a *feme sole* by the Common Law. *Co. on Lit. fo.* 134. *sect.* 200. *Finches law, lib. 2. c.* 1. *p.* 86. *Co.* 4. *lib. fo.* 23. *in Clark and Pennyfathers Case.*

83. When one is grown so old, as that he is become a Child again in his understanding, and is deprived not only of Reason, but also of Sense almost; or grown so forgetful (through Age or other infirmity) that he hath forgotten his own name; such person can no more make a Testament then a Child. *Fran. Mantica de conject. ult. Volunt. l.* 2. *tit.* 15. *num.* 16. *Simo. de Praetis. de interp. ult. volunt. l.* 2. *dub.* 21. *fol.* 4. *numb.* 22. *Swin. part* 2. *sect.* 5.

84. An Excommunicate person may make his Testament; unless he be excommunicate for Heresie or manifest Usury, or some other cause

for

for the which he is prohibited to make a Testament; or unless he be excommunicate with that great Curse which is called *Anathema*, and is not inflicted but upon great cause. *Swin. part 2. sect. 22. Mich. Graff. the fourth com. opin. sect. 5. Testam. quest. 24.*

85. By the Civil Law, such as marry within the levitical degrees, and prohibited to marry by Gods Law, cannot make a Testament, or dispose of any goods or chattels to their children begotten in such incestuous Marriage; unless it be so much only as will serve for their competent sustentation or maintenance; or that they be appointed but Dative Executors, without any other benefit: or if the Parents were ignorant of the impediment of such Consanguinity or Affinity, then the children born during such ignorance by the Ecclesiastical Canons are capable of all Legacies, and all manner of Testa-

mentary benefits, as legitimate, albeit the parents afterwards should be divorced: Observe also, that as the incestuous persons aforesaid cannot make a Testament, or dispose of any goods to their incestuous children: so neither can they devise their goods to any other, except it be to their parents, or brother, or sister, or uncle, or aunt, or to such children as were begotten in lawful Marriage by a former wife, if they had any.

86. Several other persons there are who fall under Ecclesiastical Censures, and are prohibited by that Law to make a Testament: but being that they are not deprived of this privilege by our Common or Statute-Laws, which limit the power of the Ecclesiastical Courts within this Kingdom; I shall omit therefore to mention them, and so conclude this Chapter.

CHAP.

CHAP. IV.

Who may be an Executor, and who not.

87. NOte, that every person may be an Executor, and is capable of a Legacie; saving such persons as are prohibited by Law: yea, in some cases those who cannot make a Testament or Will, may be Executors; as a child in the Mothers womb, an Infant, a married woman, a Bondman or Villain; and in such case the Villain may have an Action against his own Lord, if he were indebted to the Testator. *Lit. l. 2. c. 11. Bro. abr. tit. Villenage 68. & tit. Executor. Cowels Inst. p. 129. Glan. l. 7. c. 6. Old Tenures, tit. Villenage. Fra. Mantica de com. ult. Volunt. l. 4. tit. 8. Swin. part 5. sect. 1.*

88. And if the Testator make his

own Villain Executor, he doth thereby manumit and free him from Bondage. *Cowels Inst. p. 13. Bract. l. 4. c. 21. Co. on Lit. fo. 136.*

89. Note, that if he who is named Executor be an *Apostata*, or an Heretick, either at the time of the making the Testament, or at the time of the death of the Testator, or at the time when he would undertake the Executorship; in all these Cases he is to be excluded by the Civil Law. *Sichard. in Rubr. de Hered. Instit. C. num. 5. Mich. Grass. Thesaur. com. opin. sect. Instit. quest. 28. Swin. part 5. sect. 2, 3.*

90. He who is convicted of Treason or Felony, is incapable of an Executorship or Legacie: but if he were attainted of Felony, and afterwards admitted to his Clergie, then he may be an Executor, *Or. Mich. Grass. Thesaur. com. opin. sect. Instit. quest. 5. Labrig. de Cases edit. anno Dom. 1599. fo. 180.*

num. 13. *Swin. part* 5. *sect.* 4.

91. An Outlawed person, so long as he standeth in that case, is not to be admitted to the Executorship, nor can sue for his Legacie: but though the Ordinary do not admit him, yet if he shall Administer as Executor, because it is to the use of another, it is held to be good in Law. But if the Testator bequeath the residue of his goods, or some Legacie, to the Executor, being an outlawed person, the same is forfeited and confiscate by force of the outlawry. *Dr. & Stud. l.* 2. *c.* 6. *& l.* 2. *c.* 3. *Lehrig. des Cases edit. anno Domini* 1599. *tit. Execut. fol.* 179. *Swinb. part.* 5. *sect.* 5.

92. An unlawful College (that is, such Companies, Societies, Fraternities, and other Assemblies whatsoever, not confirmed nor allowed by Authority for a lawful Corporation) cannot be Executor. See afterwards *num.* 99. *Perkins sect.*

505. & 510. 9 *Ed.* 6. *fo.* 23. *Swin. part* 5. *sect.* 9.

93. Libellers, manifest Usurers, Sodomites, and other criminous persons, who are forbidden to make a Testament, can receive no benefit by the last Will or Testament of another person: for it is a common received Conclusion, That he that cannot make a Testament or last Will, by reason of some Crime by him committed, the same person is incapable of any Legacie of goods disposed by the last Will or Testament of another. *Jul. Clar. sect. Testament. quest.* 43. *num.* 2. *Vasq. de success. progress. l.* 1. *sect.* 2. *num.* 18. *Swin. part* 5. *sect.* 10. 11. *Reformat. leg. Eccles. tit. de Test. cap.* 14.

94. A Recusant convicted at the time of the Testators death, or at the time of granting Administration, cannot be Executor nor Administrator. *Wingate Abr. Stat. tit. Crown, num.* 134, 141.

95. If

95. If the Testator intending to make *John at Style* Executor, say, I make *John at Noke* my Executor; in this case neither of them is to be Executor; for *John at Style* is excluded, because the Testator never spoke it; and *John at Noke* is excluded, because the Testator never thought it. *Swin. part 7. sect. 5. num. 3.*

96. Or if the Testator say, I make my Cousin *John at Style* my Executor; if *John at Style* be not his Cousin he cannot be Executor, unless the Testator were wont commonly to call him Cousin. *Mich. Graff. Thesaur. com. opin. sect. inst. quæstio 90. num. 4. Swin. part 7. sect. 5. num. 4.*

97. Also if the Testator say, I make *John at Style* my Executor, and there is two of that name, neither of them shall be admitted, unless one of them were of the Testators familiar acquaintance, or his Kinsman, and the other

a stranger; for in such case the stranger shall be excluded, and the other admitted. *Simo. de Prat. de Interp. ult. Volunt. l. 1. fo. 97. num. 1. 3. & 100. Franc. Mantic. de conject. ult. Volunt. l. 8. tit. 4. num. 5. Swin. part 7. sect. 8.*

98. And if both of them be of the Testators acquaintance, or both of them Kinsmen; then he which is of the greater acquaintance, or nearer of Kin, shall be admitted, and the other excluded; and in such case, he shall be adjudged to be nearest of kin, to whom Administration should have been committed if the Testator had died Intestate. *Fran. Mantica de conject. ult. Volunt. l. 4. tit. 6. num. 3. 4. Simo. de Prat. de Interp. ult. Volunt. l. 1. fo. 96. num. 9. Swin. part 2. sect. 8. num. 3. 4.*

99. If the Testator make the poor his Executors, giving them the residue of his goods, this disposition is not void by reason of incertainty,

certainty, because it is a Testament *in pias causas*. By the Poor therefore is understood the Poor of the Parish where the Testator did dwell and keep house; and the Ordinary is to take care that the Poor have their due, according to the meaning of the Testator. Also, if the Testator bequeath any goods or money to the Parishioners of any Parish, to the use of the Church, such a Bequest is good, and the Legacie may be recovered by the Churchwardens, who albeit in every respect they be not a lawful Corporation, yet in this respect, in favour of the Church, they are accounted a lawful Corporation. And where it is said that unlawful Colleges or Companies, &c. (not incorporated by the Kings Authority) cannot be Executors, yet in such case, if the several and particular persons, by name of an unlawful College, &c. be appointed Executors, they are not to be re-

pelled. *Franc. Mantica de conject. ult. Volunt. l. 8. tit. 5. num. 2. Tiraquel. tract. de privileg. pia causa privileg. 56. Lambert. Tract. de Officio Gardianarum, fo. 43. Bra. tit. Corporation, num. 55, 73, 77, 84. Fulb. l. 1. fo. 42, 43. Swin. part. 7. sect. 8.*

100. If the Testator make his own Kin his Executors, in this case those of Kin who are nearest to him, and should have had the Administration if the Testator had died Intestate, shall be first admitted, and enjoy the Executorship during their lives; and after their deaths, then the other next of Kin to the Testator is to be admitted successively one after another, and not all together; but if the Testator make another mans Kindred his Executors, in such case they are all to be admitted together to the Executorship. *Simo. de Prat. de Interp. ult. Volunt. l. 3. fo. 91. numb. 28. Mich. Grass. Thesaur. com.*

open. sect. Inst. quest. 20. sect. Fidei commiss. quest. 16. & sect. legat. quest. 41. Swin. part 7. sect. 8. num. 10.

101. Where the Testator makes the next of his Kin his Executor, and dies without issue of his body; in this case the father or mother, if living, shall have the Executorship, as next of kin to their son; contrary to the Judgment given in the 9 B. 6. in the Duke of *Suffolks* Case, which Case is now over-ruled, and not held for Law. *Co. 3. lib. fo. 40. in Ratcliff's Case there. Cowels Inst. p. 40. Trin. 22 Car. 1 B. B. Styles Registrum Practicale, p. 22. Swin. part 7. sect. 8. in fine.*

102. If the Testator say, I make *A* or *B* my Executors; in this case it is all one as if he had said, I make *A* and *B* my Executors unless it be where the Testator bears more affection to the one then to the other, and then he which he bears most affection to, shall be preferred: as, where the

Testator makes his brother or *John at Style* his Executors, in this case the brother shall be first admitted, and after his death, then *John at Style* (if he be living) shall be admitted. Also, where one of the persons so named is incapable, then the disjunctive standeth properly, and the other shall be admitted alone to the Executorship. *Jul. Clar. sect. Testam. Quest. 80. num. 5. Swin. part. 7. sect. 9.*

103. An Excommunicate person, so long as he standeth in the Sentence of Excommunication, is not to be admitted to an Executorship by the Ordinary, nor can he commence any Suit there for his Legacie. *Michael Graff. thesaur. com. opin. sect. Inst. Quest. 4. Swin. part. 5. sect. 6.*

104. Bastards, begotten and born in Adultery or Incest, are not capable of any benefit by the Testament or last Will of their Incestuous or Adulterous Parents; except

cept there be only so much bequeathed, as will suffice for their competent Alimentation or Relief, that is to say, for their Food, Clothing, Lodging, and other meet and convenient necessaries, according to the degree and ability of their Parents; or that it be in case of Lands, Tenements, and Hereditaments; for there a man may by his Testament or Will in Writing devise to his Bastard all his Lands, Tenements, or Hereditaments; and such Bastard may sue for the same, and recover them: and so it was adjudged in the Lady *Griffins* case, upon the Testament of Sir *Francis Worsley*, who devised all his Lands to his base daughter. *Mich.* 18. *Car.* 2. *B. R. Mich. Grass. thesaur. com. opin. sect. Instit. Quæst.* 7. *Cabr. com. Conclus.* 6. *tit. de Aliment. conclusio* 1. *num.* 5. & 31. *Menoch. presumpt. lib.* 4. *presumptio* 157. *num.* 3. 32 *H.* 8. *c.* 1.

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Brac. l. 2. c. 7. Swin. part 2. sect. 27. & part 5. sect. 7.

105. Note also, that these incestuous or Adulterous Bastards may be Executor to any other person, saving to their natural parents, and are capable of a Legacie bequeathed to them from any other person; yea, even to their own Incestuous or Adulterous brethren they may be Executors, or receive any other Testamentary benefit from them. *Jul. Clar. sect. Testament, quest. 31. num. 4. Swin. part 5. sect. 7.*

106. Also where they are appointed but only bare and nude Executors, and repeive no benefit by the Testament, in such case, they be admitted Executors to their own natural Parents. *Simo. de Prat. de Interp. ult. Volunt. l. 5. fo. 17. num. 27. Swin. part 5. sect. 7.*

107. The Adulterous Grandfather may bequeath any thing to the lawful children of his own unlawful sons or daughters, or make them

them his Executors: but so cannot the Incestuous Grandfather. *Covar. in D. cap. 8. de sponsal. part 2. sect. 5. num. 13. Bald. de Incest. Swin. part 5. sect. 7.*

108. Several other Persons there are, who by the Civil and Ecclesiastical Laws are prohibited Testamentary benefits; but being that I find little or no mention made of them, either in our Common or Statute Laws, (which limit the power of those spiritual Courts here in *England*) I shall therefore pass them over in silence, and proceed to the next Chapter.

CHAP.

CHAP. V.

Of the several manners of appointing an Executor.

109. TO name or to appoint one as Executor, is to place one in stead of the Testator, who may enter into the Testators goods and chattels, and have an Action against the Testators Debtors, and may dispose of the same goods and chattels towards the paiment of the Testators Debts, and performance of his Will: which if he neglect to do, he may be sued by the Creditors or Legataries, so long as he hath assets in his hands. *Nov. Max. p. 101. Terms of the Law, verb. Executor. Swinb. 4. sect.*

110. Now this naming or appointing an Executor is the head of

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the Testament; and as the body is dead that lacketh an head, so the Testament is as it were dead that lacketh an Executor; for it is the foundation of the Testament; and no Testament can stand without it, or be called a Testament: and though there be never so many Legacies or Devises given therein, yet it is but a Codicil or Will, and not a Testament, and the Administration of the goods, with such Codicil or Will annexed shall be committed to the next of kin of the party deceased, as of one dying Intestate. *Justin. Instit. l. 2. tit. de Legacies, N. 34. Swin. part. 4. sect. 2.*

But if an Executor be named, though no Legacie be left, or Devise made, yet such disposition is a Testament, whether the same be Solemn or Unsolemn, Written or Nuncupative, Priviledged or Unpriviledged: and in this case the Ordinary cannot commit the Ad-

Administration of the dead man's goods, as of one dying Intestate, if such Executor be capable and willing to undertake the Execution of the Testament. *Bro. Abr. tit. Execut. F. N. B. eod. tit. Swin. part 4. sect. 2.*

112. And as to the appointing of an Executor, it may be done either simply or conditionally; or from a certain time, or to a certain time; or universally, or particularly; or in the first, second, third, or fourth degree, &c. and lastly, one or divers may be appointed Executors. *Bro. tit. Executor, N. 2, 9, 13, 14, 38, 117, 155. Dyer fol. 3. Cowels Inst. p. 129.*

113. If the Testator say, I make *A B* my Executor; or, I institute *A B* my Executor; or, I will that *A B* be my Executor; or, I desire *A B* to be my Executor; or *A B* shall be my Executor: these and such like words make a simple Nomination of an Executor, where no condition is annexed by the Testator:

tor: and it is not material in what part of the Testament the Executor is appointed; for the Law regardeth not so much the form or the words, as the meaning of the Testator. *Mich. Grass. thesaur. com. opin. sect. Legatum, quæstio 43. N. 2. & sect. Institutio, quæstio 1. & 14. Swin. part. 4. sect. 4. num. 2, 3, & 11.*

114. Therefore if the Testator say, I commit all my goods to the disposition of *A B*; or, I commit my soul and all my goods to the hands of *A B*; or, I make *A B* Lord of all my goods; or, I make my Wife Lady of all my goods; or, I leave all my goods to *A B*; or, I make *A B* Legatary of all my goods; or, I leave the residue of all my goods to *A B*; in these cases it is presumed that such person is intended to be made Executor by the Testator: for it is not always necessary to express the word

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Executor, neither hath every Testator skill so to do: therefore if the Testator write after this manner: *In all my Goods moveable and unmoveable I make* A. B. though the Testator do not adde *Executor*, yet it is to be understood and supplied. *Bro. Tit. Executor. 98. Mich. Grass. Thes. com. opin. sect. Instit. quæstio 14. Swin. part. 4. sect. 4. num. 4. 5. Franc. Mantica de conject. ult. volunt. l. 4. tit. 3. num. 5. & 8.*

115. If the Testator say, I make *A B* my Executor, if *C D* will not, in this Case *C D* is presumed to be Executor, and may be admitted, if he please, and exclude the other. Or, if the Testator supposing his Childe or Friend to be dead, say in his Will, *Forasmuch as my Child or Brother is dead, I make* A B *my Executor*: In this Case, if the Childe or other person be alive, whom the Testator imagined to be dead, then he that is named Executor shall not be admitted to the

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Executorship, but the Childe, or other Person, whom the Testator thought to have been dead. *Franc. Marc. de conject. ult. volunt. l. 4. tit. 4. Swin. part 4. sect. 4. num. 6.*

116. When the Testator doth add something to the assignation of an Executor, whereby the effect of the disposition is hindred or suspended, and dependeth upon some future event, then such assignation of an Executor is conditional: and there are divers words whereby the disposition of the Testator is made conditional; as *if, when, while, wheresoever, whensoever*, and several other, &c. *Mich. Graff. Thes. concl. opin. sect. Legatum, quæstio 46. Franc. Marc. de Conject. ult. voluntat. l. 10. n. 51.*

117. And as there are divers words which make a conditional disposition, so there are divers sorts and divisions of conditions, whereof some necessary, some impossible, some possible or indifferent: when

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the Condition is extreme, (that is to say) either necessary or impossible for such a Condition hindereth not the Executor or Legatary, but that he may be admitted to the Executorship, or recover the Legacy, as if such Condition had not been at all expressed. *Justin. Instit. l. 2. tit. de Hæredibus Instituendis, num. 10. Swin. part. 4. sect. 5. num. & sect. 6. num. 2.*

118. But when the Condition is not extreme, but indifferent or possible, then it must first be fulfilled before the Executor be admitted, or the Legatary recover his Legacy: but there are divers limitations to both these Rules, as will appear by the several Cases hereafter mentioned in this Chapter. *Mich. Graff. Thesaur. communium sect. Legat. quæst. 52. Swin. part. 4. sect. 6. num. 4.*

119. If the Testator make his Executor, or give him an hundred pounds, if or when his Son dies;

dies, here the Executor or Legatary cannot obtain the Executorship or Legacy till such a thing happen, but must wait the event of the Condition. *Paul de Castr. in li. extraneum, li. 1. cap. de Hæred. Instituendis. Swin. part 4. sect. 6.*

120. If the Testator make *A B* his Executor, or give him an hundred pounds if he marry his the Testators daughter, supposing her to to be living, whereas she is dead; in this case though the Condition be impossible, yet because the Testator did think her to be living, and therefore the Condition possible, *A B* in this case cannot be Executor, nor obtain the Legacy: or if the daughter were living, but died before Marriage, in such case it is all one; but if she were living, and afterwards did refuse to marry, yet notwithstanding *A B* might be admitted to the Executorship, or obtain the Legacy. *Franc. Mantica de conject. ult. voluntat. l. 2. tit. 16. num. 23.*

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Menoch. de præsumpt. l. 4. fol. 706. num. 40. Bonin. part. 4. sect. 6. num. 9, 14, 15.

121. But if the Testators Daughter were willing afterwards to marry with *A B*, before he have obtained the Executorship or Legacie, and then he refuseth her; in this case he ought not to be admitted to the Executorship, or obtain the Legacie, unless after her refusal at first, and before her willingness he be married to another woman, or have obtained the Executorship or Legacy, and is possessed thereof; for then her repentance comes too late. *Franc. Mantica de Conject. ult. volunt. l. 11. tit. 18. num. 30, 38. Menoch. de præsumpt. l. 4. fol. 183. num. 19. Sum. part 4. sect. 10.*

122. Also if the Testator make *A B* his Executor, or give him too pound if he marry his daughter, and he refuses to marry her; here he cannot be admitted to the Executorship,

tutorship, or obtain the Legacie, although afterwards he be willing to marry her, and then she will not marry him, unless that at such time when he refused, he were not of sufficient age to marry: for his dissent at that time when he could not consent, doth not hinder him, nor is it a breach of the condition. *Mich. Grass. thesaur. tom. opin. sect. Legatum, Quest. 46. num. 16. Menoc. de Præsumpt. l. 4. fol. 1698. num. 22. Swin. part 4. sect. 8.*

123. If one make *A B* his Executor, or give him 100 pounds, if he erect a Monument within three days after the Testators death: in this case, if the Executor or Legatary do perform the same with as much speed as is possible, it is sufficient, though it was not done within three days. *Swin. part 4. sect. 6. num. 11.*

124. If the Testator charge his Executor, to whom he hath given

all the residue of his Goods. That if he do not touch the Skie with his Finger, or kill his Father, to pay then to *A B* 100 pounds: in this case he is not bound to the performance, for such Legacie to *A B* is void. *Reformatio Legum Eccles. tit. de Testamentis, C.* 15. *pag.* 135. *Swin. part.* 4. *sect.* 6. *num.* 12.

125. Where the Testator makes thee Executor, or gives 100 pounds, if thou pay 10 pounds to *C D* before a certain time; within which time *C D* dyeth, and then thou payst the 10 pounds within the time to his Executor, or Administrator: in this case, because thou didst not pay the 10 pounds to *C D* himself, thou canst not be Executor, nor obtain the Legacie. *Franc. Mantica de conject. ult. volunt. li.* 11. *tit.* 17. *num.* 25. *Swin. part* 4. *sect.* 7.

126. But if thou be made Executor, or 100 pounds is bequeathed to thee, if thou pay unto the Testators

Son

Son (being an Infant) 10 pounds; in this case, if thou pay to thy Childes Tutor, it is a sufficient performance of the condition. *Mich. Grass. thesaur. com. opin. sect. Legatum, quæstio* 52. *Francisc. Mantica de conject. ult. volunt. l.* 11. *tit.* 17. *num.* 29. *Swin. part* 4. *sect.* 7.

127. Also if the Testator make thee Executor, or give thee 100 pounds, if thou go to Church on *Easter*-day; and when the day comes thou art willing to go, but art not able to do it, by reason of overflowing of waters, or some other necessary impediment; in this case notwithstanding thou shalt be admitted to the Executorship, and mayst recover the Legacy, as if thou hadst gone to the Church that day: but if at the day thou wert going to the Church, and by the way committest some crime, whereupon thou art arrested and stayed; in this case thou shalt not be

admitted to the Executorship, nor recover the Legacie, because thou wert the cause thy self wherefore the condition was not performed, and the other was *Actus Dei. Min. sing. in sect. penult. Inst. de Hæred. num. 2. Franc. Mantica de conject. ult. Volunt. l. 11. tit. 16. num. 24. Swin. part 4. sect. 8.*

128. If the Testator make thee Executor, or give thee 100 pounds if thou marry his Daughter within a Month; and another person doth hold her purposely from thee, that thou canst not marry her within the time: yet in this case the condition is reputed to be performed by reason of thy willingness, and thou mayst obtain the Executorship or Legacie: but if such person doth not detain her purposely, but is ignorant of the Testators Will, then in such case the condition is not taken to be performed. *Franc. Mantica de conject. ult. Volunt. l. 11. tit. 16. num. 22.*

Swin.

Swin. part 4. sect. 8. num. 19.

129. If the Testator make thee Executor, or give 100 pounds if thou bury his body within the Cathedral Church of St. *Peters* in *York*, and the Testator afterwards dieth Excommunicate, for which his Sepulchre is denied, so that thou canst not bury him there; yet notwithstanding, because it was not thy fault but the Testators, thou mayst therefore obtain the Executorship or Legacie. *Sichard. in l. 1. cap. de Inst. & Substitut. num.* 1. *Swin. part* 4. *sect.* 8. *num.* 18.

130. If the Testator make his Wife Executrix, or give her 100 pounds, if she abideth with his Children; in this case, if she enter into bond to perform the condition, or else to make restitution, she may then be admitted to the Executorship, or obtain the Legacie. *Paul de Castr. in d. li. Mutiana, sect. Sciendum. Simo. de Prat. de Interp. ult. volunt. f.* 5. *fo.* 42. *Interp.* 2. *dub.* 1.

num. 24, 25. Swin. part 4. sect. 9. Reformatio Leg. Ecclesiast. de Testam. c. 31.

131. Also if the Testator make thee Executor, give thee 100 pounds, if thou never play at Cards or Dice, or, if thou never give away thy Lands: in such case, entring into sufficient Bonds to perform the condition, or else to make restitution, thou mayst then be admitted to the Executorship, or obtain the Legacie. *Paul. de Castr. in d. L. Mutiana. Simo. de Pratis. de Interp. ult. Kal. li. 5. Interp. 21. dub. 1. numb. 25. Swin. part 4. sect. 9.*

132. But if the Testator make thee Executor, or give thee 100 pounds, if thou never play at Cards or Dice, or, if thou do not at any time give away thy Lands to *A. B.* there thou canst not be admitted to the Executorship, nor obtain the Legacie, untill the condition be brought into that state, that it cannot be infringed. *Glass. in d. L. Mutiana. Swin. part 4. sect. 9. num. 14.*

133. Those conditions which to impugn and hinder that liberty which every Testator ought to have by the Law in the making of his Will, are accompted unlawful; therefore if the Testator make thee his Executor, or give thee 100 pounds if thou shalt make him thy Executor, or give him 100 pounds in thy Testament; or, if the Testator make thee Executor, or give thee 100 pounds, if A B will; or, if the Testator make such a person Executor, or give him 100 pounds whom thou wilt appoint: in these cases, though thou name one to be Executor, or, that A B will that thou be Executor, or have the Legacie; yet thou shalt not be admitted to the Executorship, nor have the Legacie, because by such means that free liberty which every Testator ought to have in the making of his Testament might be taken from him, and

and he deprived of that privilege; therfore such dispositions are said to be captious. *Sichard. in li. Captorias, c. de Mil. Test. num. 6. Mich. Grass. thesaur. com. opin. sect. Inst. quæstio* 18. *Swin. part* 4. *sect.* 11.

134. But if the Testator make thee Executor, or give thee 100 pounds, if *A B* shall esteem it convenient, in this case, if *A B* esteem it convenient thou be admitted Executor, or have the Legacie of 100 pounds, then thou art to be admitted to the one, or mayst obtain the other: or, if the Testator make one of his Servants his Executor, whom thou shalt chuse; in this case him whom thou shalt chuse of the Testators servants shall be Executor. Note the diversity of these two Cases, from the Cases last going before. *Mich. Grass. thesaur. com. opin. sect. Instit. quæstio* 18. *num.* 6. *Swin. part* 4. *sect.* 11.

135. If the Testator make thee Ex-

Executor, or give thee an hundred pounds if thou never marry, or if thou marry according to the appointment or consent of some other person; the first of these Conditions is unlawful, because it forbids Marriage wholly; and the second is unlawful, because it is referred to another person to make choice for thee, who perhaps may chuse such an one as it is not fit or lawful for thee to marry with her: therefore in the first Case thou mayst be admitted to the Executorship, or obtain the Legacie, as if no such Condition had been: and in the second Case, thou mayst make choice of a woman thy self, (without the appointment of the other person) and marry her; and then thou mayst be admitted to the Executorship, or obtain the Legacie, but not before Marriage.

Fran. Mantica de conject. ult. Volunt. l. 11. tit. 19. Covar. Epitom. de Sponsal. p. 2. sect. 9. num. 11. Swin.

part 4. sect. 12. Mich. Graff. thesaur. com. opin. sect. Legat. quæst. 50. num. 9.

136. But if the Testator make thee Executor, or give thee an hundred pounds, if thou dost not marry before the age of one and twenty years, or if thou dost not marry a widow, or such or such a woman, or if thou dost not marry in the city of *York*; in these cases if thou break the Condition, then thou loosest all thy interest as to the Executorship or Legacie. *Franc. Mantica de conject. ult. volunt. lib. 11. tit. 19. num. 8, 9. Swin. part 4. sect. 12.*

137. Also if the Testator make thee Executor, or give thee an hundred pounds, if his daughter do not marry; in this Case, if she die unmarried, thou art to be admitted to the Executorship, or obtain the Legacie: but if the Condition were, that thou shouldst be Executor, or have an hundred

pounds, if thy daughter did never marry; in this Case, though she die unmarried, yet thou art not to be admitted to the Executorship or obtain the Legacie, because it shall be presumed that thou dinst perswade and hinder thy daughter from Marrying; and therefore to prevent such Fraud, the Law doth reject such Condition. *Franc. Mantica de conject. ult. Volunt. lib. 11. tit. 19. num. 5. Swin. part 4. sect. 12.*

138. If the Testator make thee Executor after the expiration of five years after his death, or he doth make thee Executor for and during five years after his death; this Assignation is lawful, and the Ordinary may commit the Administration of the Deceased goods in the mean time to the next of kin, during which time the act of the administrator is good, and cannot be avoided by the Executor afterwards: and the Ordinaty may also commit the Administration of the Deceased

ceased Goods unadministred by the Executor, after the expiration of the time of the *Executorship*, where thou art appointed Executor but for a time. *Bro. tit. Administr.* 45. *tit. Exec.* 155. *Plo. com. in Griesby and Foxes ca.* Swin. *part* 4. *sect.* 17.

139. If the Executor make his wife Executrix; and if she will not or cannot be Executrix, then he maketh his son Executor; and if his son be not Executor, then he maketh his Sister Executrix; and if she be not Executrix, then he maketh his brother Executor: in this Case, the Testator is said to make degrees of Executors; and in this example there are four degrees of Executors. And observe always, the Executors in the first degree (as the Wife is here) is said to be *instituted*, and all the rest *substituted*. *Mich. Graff. thesaur. com. opin. sect. Substit. questio* 1. Swin. *part* 4. *sect.* 19.

140. Note also, that it is lawful for the Testator to make as many degrees of Executors as he pleaseth; and he may substitute into the place of one Executor, either one or more; and into the place of many Executors he may substitute one alone, or he may substitute to every Executor one, or one of them to another. *Justin. Instit. tit. de vulgari substitutione, num.* 1, 2. *Swin. part* 4. *sect.* 17. *Cowels Inst. p.* 131.

141. But if the Testator do institute divers Executors, substituting one or more to them; so long as any of them which was first instituted may be Executor, the substitute is not to be admitted, unless the Testator do appoint to every such Executor a substitute; for then any one of these first instituted Executors, not being able, or refusing to be Executor, his substitute is then to be admitted with the rest of the Executors first instituted;

stituted; whereas otherwise any one of the first instituted Executors in the first degree, lawfully undertaking the Executorship, all the substitutes are excluded: and in such case, if the Executor afterwards die intestate, then the Administration is to be committed of the rest of the goods of the Testator deceased, not administred by the Executor, except in some special cases. *Mich. Graff. thesaur. com. opin. sect. Substit. quæstio 9. Repam. in l. 1. de vulgo Substit. num.* 185, 187. *Swin. part* 4. *sect.* 19.

142. If the Testator make thee Executor if thou give ten pounds to *A B*; and if thou do not, then he doth appoint another to be Executor: though thou refuse to give ten pounds to *A B*, yet cannot that other be Executor, unless he give ten pounds to *A B*, because this condition of giving expressed in the institution, is understood to be repeated in the substitution. *Mynoch.*

noch. de præsumptio. 177. num. 28. Swin. part 4. sect. 19.

143. Note that every one may appoint as many Executors as he lists, so that the number be not infinite, as to say, *I make all the men in the world my Executors*: for such an Assignment (being an Argument of insanity of the minde) is void, at least in effect. *Mich. Graff. thesaur. corv. opin. sect. Instit. quæstio* 13.

CHAP. VI.

Of appointing Tutors, and some few things touching Childrens Portions.

144. NOte, that every one, who may be an Executor, may be a Tutor, but no Tutor may intermeddle as Tutor, until he be

be confirmed by the Ordinary; and where one that is named Tutor is Lunatick, or absent beyond Sea, in such like cases the Ordinary may appoint another during such impediment: Also it is the custom of several places, that when divers are appointed Tutors, there in such case one alone may Administer, when the other cannot or will not intermeddle with the Tutorship. *Swin. part 3. sect. 10, 12. Cowels Inst. p. 31.*

145. And it is also the custom of several places, that if the Father appoint not a Tutor by his Will to his Children, then the Mother by her Will may appoint one; and if neither Father nor Mother appoint one, then a Stranger (if he make the Child his Executor) may appoint one; and if there be no Tutor Testamentary, then the ordinary may appoint one. *Flota, l. 1. c. 9. Swin. part 3. sect. 9. Vide Co. 3. li. fo. 38. Cowels Inst. p. 30, 41. Noys Maximos, p. 105.*

146. Now

146. Now as to the appointing of Tutors, it matters not by what form of words they are appointed, so that the Testators meaning can but appear; nor in what Language the Tutor is assigned, whether in English, Latine, Greek, or any other Tongue. *Swin. part 3. sect. 12. Stein. Ferm. Consil. 83. Vol. 1.*

147. It was the custom of many places formerly, that a Boy after he had accomplished the age of fourteen years, and a Girl after she had accomplished the age of twelve years, might then chuse their own Tutors if they pleased, and refuse the Tutors appointed them by their Fathers Will; but now by the statute of 12 *Car. 2. cap. 24.* every Father, whether he be of the age of twenty one years or under, may by Deed executed in his life-time, or by his last Will and Testament in writing delivered in the presence of two or more credible Witnesses, dispose of his Children under the

age

age of twenty one years, and not married at the time of his death, for and during such time as they shall remain under the age of twenty one years, or any lesser time, to the custody and tuition of any person or persons, in possession or remainder (Popish Recusants excepted) and such disposession of such Children, since the 24. of *Feb.* 1645. or hereafter to be made, shall be good against all and every person and persons, claiming any such Children, as Guardian in Soccage, or otherwise. *Litt. l. 2. c. 5. Swin. part 3. sect. 21. Vide Noys Max. p. 105. & Cowels Inst. p. 33. 12 Car. 2. c. 24.*

148. And such person to whom such Children shall be disposed or devised, may have an Action of Raviſhment of Ward or Treſpaſs against such person, as shall wrongfully take away or detain such Child or Children, for the recovery of them, and recover damages

for

for the same in such Actions, for the use of such Child or Children; and they are also impowered by the same Act of Parliament, to take into their custody, to the use of such Child or Children, the profits of all the Lands, Tenements and Hereditaments of such Child or Children; and the custody and management of their Goods, Chattels and personal Estate, until the Age of twenty one years, or lesser time, according to the Parents disposition; and may bring an Action in pursuance thereof, as by the Law-Guardian in Soccage might do, 12 *Car.* 2. *c.* 24.

149. Note, that every Tutor ought to take care that his Pupil be honestly and vertuously brought up, and must provide for him Meat, Drink, Apparel, Lodging, and other necessaries according to his quality and condition, and ought to

to dispose of his Pupils Goods and Chattels to the Pupils best advantage, in selling of such Goods as will not keep without damage, and preserving of the rest till the Pupil come of age: And to this intent, it is the custom in many places, especially within the Province of York, that the Tutor at the Entry of his Office makes a true Inventary of all the Goods and Chattels of his Pupils, and doth enter into Bond with Sureties before the Ordinary, to make a just accompt; and then he is admitted and confirmed, and may seize upon the body of the Pupil, and take possession of his Goods. *Bro. tit. Guardian, F. N. B. fol. 118. b. Swin. part 3. sect. 13. and Cowels Inst. p. 49.*

150. Formerly there were several Ages to be taken notice of both in Boys and Girls, when they should be out of Tutorship; as, if a Boy were in Ward, by reason of Lands held in Knights service, he could

not be out of Wardship till twenty one years of Age; but in other cases at fourteen years of Age he might chuse a new Tutor, if he liked not his old, and might call his old Tutor then to accompt; and for a Wench at twelve years of age might chuse her Tutor, unless she were in Ward by reason of Lands held in Knights service, as aforesaid; and then she was to continue in Wardship till sixteen years of Age, unless she were fourteen at the death of her Ancestor; and then she was free, and might chuse her Tutor: but now these Wardships are quite taken away by the 12 *Car.* 2. and every one may dispose of his Children to whom he pleaseth, observing the Rules aforesaid, in number 147. *Lit. l.* 2. *c.* 4. *Brac. l.* 2. *c.* 37. *num.* 3. *Bro. tit. Guard.* 7. 35 *H.* 6. *fo.* 52. *Co. Litt. fol.* 78. *Fleta. l.* 1. *c.* 2. *West.* 1. *c.* 22. *Mert. cap.* 6. *Co.* 2 *part. Inst. fol.* 90. *and* 203. 135, 136. *Stat. Marlbr. c.* 17.

7. Comels Inst. p. 37. and 43. Swin. part 3. sect. 14. F. N. B. 143.

151. Note that there is a general custom within the Province of York, and in several other places, that there is due to the lawful Children of every man being an Inhabitant or Housholder within the same Province, (and dying there or elsewhere) a filial or Childs part and portion, which is sometimes a third part, and sometimes an half part of the Fathers clear moveable Goods, as hath been afore-shewed, unless the Child be heir to his Father, or were advanced by him in his life-time; upon which exceptions hereafter follow several observations. *Lindwood in C. Stat. de Testament. l. 3. Provinc. Constit. Cant. Brac. l. 2. c. 26. F. N. B. de Rat. part bonor. Swin. part 3. sect. 18.*

152. As, if the Father should by his last Will and Testament forbid

his

his Child to have any portion of his Goods, such Will in such Cases is void, and the Child may notwithstanding recover his filial part or portion: also, if the Father should leave his Child but twenty pounds, when by the rate of the Inventary it comes to an hundred pounds; here he may refuse the Legacie, and recover his full portion, notwithstanding the Will: or, if the Father should impose any condition upon the said portion, as to be paid seven years after his death, or the like; yet the Child may sue for it presently after his Fathers death, and recover it before the seven years be out; for it is presently due upon the Fathers death, notwithstanding his Fathers Will to the contrary: and if the Father by his Will should bequeath the Portion after the Childs death to any other person, in such case the Will is void, and the Portion shall go to the Executors or Administrators of the

the Child after his death: But suppose if the Father leave the Child a far greater sum then by the rate of the Inventary the Childs part would come unto, in this case the Father may impose what condition he pleaseth upon it, and the Child must either take it with the condition annexed, or otherwise he may refuse it, and stand to his Childs part without condition annexed to it. *Swin. part 3. ſect. 16. numb. 4,5,6,7 & 8.*

153. Also, if a man have a Son or Daughter married in his life time, who hath a Child or Children, and then dies, and afterwards the Grand-father dies; in this case the Grand-children shall recover such part of the Grand-fathers Goods as should have been due to their Father or Mother for their Childs portion if they had lived. *Reformatio Legum Eccles. tit. Teſt. cap. 10.*

154. If the Father leave a Legacie

ment to his Child, being neither Heir, nor advanced by him in his life-time, and do not mention whether it shall be in lieu and recompence of his filial portion or no; in such case, if it be as much or more in quantity then the filial portion extends unto by the rate of the Inventary, or if it want but a very little thereof, then it shall be presumed to be given in lieu of his Portion; but if the Legacie be very small, then the Child shall both recover the said Legacie, and his filial Portion. *Menoch. de Presumpt. lib. Presumptio* 109. *num.* 6. 26. *and* 150. *Swin. part* 3. *sect.* 18. *num.* 9.

155. Where the Child is Heir to his Father in Fee-simple or Fee-tail, though the Lands be but of very small value in regard of the personal estate of his Father, yet he is thereby barred from having any filial Portion, by the custom of the Province of *York*, and some other

places: yea, although he be but Heir in reversion, or hold Lands as Heir which are but Mortaged with power of Redemption upon payment of such a sum of money at a certain day; yet during such holding, till the condition be performed, he is barred of his filial portion; but if he have only copyhold-lands after his Fathers death, in such case he is not barred from the recovery of his filial portion. *Dyer fol.* 124. *pl.* 38. *Swinb. part* 3. *sect.* 18. *and the opinions of Sir* Tho. Hescoth *Doctor of the Civil Law, and Sir* Jo. Savile, *one of the Barons of the Exchequer, Judge of Assize at* York 1604. *cited by Mr* Swinborn *in his Marginal Notes.*

156. If the Father bestow or give any thing to a man of trade, to take his son an Apprentice, and to teach him his Trade; or bestow any thing upon a Schoolmaster or Tutor in the Universities of Ox-

for

ford or *Cambridge*, for the increase of his Childs knowledge in Learning; or buy an Advowson, or Ecclesiastical Benefice or Dignity, and afterwards presents his Son to it; or the Son being much indebted, the Father pays off his debts, or buyes an Office, and bestows it upon his Son; or if any other but the Father bestow a preferment on his Son, though it be never so much; yet none of all these shall be accounted such preferment or advancement, as to bar the Child from the recovery of his filial portion. *Claudius Battandier, Tract. de Legitima, cap.* 12. *num.* 19, 20, 21, 28, 22, 31. *Swin. part* 3. *sect.* 38.

157. But it is said by some, that if the Father bestow a Lease upon his Child, or grant to him an Annuity for life out of his Lands; and though the Child be to reap no benefit by these, during his Fathers

life, but after his death; yet is held for a preferment, because it was assured to him in his Fathers life-time. *Swin. part 3. sect. 18. num. 25.*

158. And it is granted for certainty, that if the Father bestow a competent portion with his Daughter in Marriage, upon him that should marry her; this is such an advancement as shall bar her from the demand of a filial Portion: but it is to be understood, that this competent Portion must be equal, or not far inferiour to that quantity which should fall to be due to such a Child after the rate and proportion of the Fathers estate, at that very time when he bestows it on his Child, and not according to such quantity as should fall due at the time of the Fathers death afterwards. *Swin. part 3. sect. 18. num. 22, 26, 27.*

159. But if such gift be not competent, but far under the rateable part of that which would fall due to

to the Child, as 5 *l.* to put in his Purse, or spend at his pleasure, when perhaps the filial Portion would amount to several hundreds of pounds; this is not such an advancement as shall hinder such Childe from the recovery of a filial portion. *Swin. part* 3. *sect.* 18. *numb.* 28.

160. Or if a man seised in Fee-simple of thirty Acres of Land, hath issue two Daughters, and giveth ten Acres with one of them in frank-Marriage, and dieth seised of the other twenty Acres; in this case, she that is married may, if she will, have part of those twenty Acres also, and put them in *hotch-pot* with the other Land, and suffer the same to lie commixed and mingled together, and so an equal division shall be made betwixt the two Sisters, and each of them shall have fifteen Acres; whereas otherwise the Sister married would get but ten Acres. *Litt.* 59. *Fynches*

Law, pag. 124. Terms of the Law, verbum hotch-potch. Swin. part 3. sect. 18. num. 33.

161. Note, that by Portion is to be understood, not only a sum of money, or part of the Fathers Goods and Chattels; but also Lands and Annuities bestowed by the Father upon the Child. *Swin. part 3. sect. 18. num. 29.*

CHAP. VII.

What things are deviseable by Will, and what not.

162. OF Lands, Tenements, and Hereditaments, some are deviseable by Custom, and some by force of certain Statutes, as hereafter appears. *Cowels Inst. page 138. Swin. part 3. sect. 2.*

193. Lands, Tenements, and He-

Hereditaments holden in Gavelkind by the custom of *Kent*, though they be holden in Knights service, may be given or devised by Will, and that without licence of the Lords, saving to the Lords the rents and services due out of the same lands and Tenements. *Terms of the Law, verb. Gavelkinde. Mich. 1655. in B. R. Hammond and Thornhills Ca. Styles Rep. fol. 476. Swin. part 3. sect. 3.*

164. And so lands, tenements and hereditaments, lying in *London, York, Oxford*, &c. and other places where the same are held in Burgage-tenure, may be devised by Will, for to hold in fee-simple, fee-tail, for life, for years, *&c.* and if he who holds such lands, *&c.* in burgage-tenure, be a Citizen or Burgess of the City or Burrough, where such Lands, tenements or hereditaments be holden in burgage-tenure, then he may devise the same in Mortmain, which otherwise he could not do if he were

not Citizen, Burgeſs, or Freeman of the ſame place: and it is not neceſſary that the Will wherein Burgage-Land is deviſed ſhould be in writing. But note, that the cuſtom of the place muſt be obſerved, concerning the Probate or Inrolment of ſuch Wills, &c. *F. N. B. Bre. ex gravi querela in pr. Bro. tit. deviſe 22, 43 and 51. Dr. & Stud. l. 2. c. 7. and 10. Swin. part 3. ſect. 3. Perkins, ſec. 577, 578. pag. 49. E. 3. deviſe 8.*

165. The Wife ſo long as ſhe lives unmarried, ſhall have half of her Husbands lands holden in Gavel-kinde. *Co. on Litt. fol. 111. Old Terms of the Law, verb. Gavelkinde.*

166. And of Lands held in Burrough Engliſh, by the cuſtom of ſome places, the Widow ſhall have the whole, and ſometimes the half of her Husbands Eſtate. *Dum ſola & caſta vixerit. Co. on Litt. fol. 111. F. N. B. 50. Litt. l. 2. c. 10.*

167.

By the Statute 32 H. 8. cap. every one (except a woman Covert, an Infant under the age of one and twenty years, or a person *De non sane Memorie*) may by their last Will and Testament in writing, or other Act lawfully executed in their life-time, give, dispose, Will or devise, all such Lands, Tenements and Hereditaments, as they are solely seized of in Fee-simple, or as much of right in them is, of all such Lands, Tenements, and Hereditaments, as they are seized of in Fee-simple in Coparcenary, or in Common in Fee-simple, to any person or persons (except to Bodies politick and corporate) And two parts of three of all such Lands, Tenements, or other Hereditaments, as they hold in Knights service. See now the 12 *Car.* 2. *cap.* 24. 32 *H.* 8. *cap.* 1. 34. *and* 35 *H.* 8. *cap.* 5. *Fynch Law, pag.* 169, 170. *Co. on Litt. fol.* 111. *b. Swin. part* 3. *sect.* 3. *and* 4. *And Wil-*

gates Abr. of Stat. tit. Wills.

168. All manner of Goods and Chattels real and personal, moveable and immoveable, may be devised by Will or Testament, except in some certain cases following. *Perkins, sect.* 511. *Lind. in C. Stat. de Testament. l.* 3. *Provinc. Const. Cantibr. Swin. part* 3. *sect.* 5. *Cowels Inst. p.* 140.

169. As where two men are joyntly possessed of Goods and Chattels, real or personal, one of them cannot make his Will, and bequeath his part to another: for when he dies, his part goes to the survivor: and so it is in Lands, Tenements, and Hereditaments also, *Perkins, sect.* 500, 526. *Dr. & Stud. l.* 1. *c.* 6. *Litt. l.* 3. *c.* 3. *Cowels Inst. pag.* 140. *Clerk of Assize, pag.* 63.

170. Nor can a spiritual Person, or Master of a Colledge, or Hospital, or Mayor of a City, devise those things which belong to their Church, Colledge, Hospital,

tal, or City; nor can the Crown or Jewels of the Realm be deviſed by Will, but they may be given by Letters-patents; and a Parſon by Will may deviſe the Corn growing on the Glebe-Land, at the time of his death. *Perkins, ſect.* 496. *and* 497, 498. *Brac. l.* 1, 2. *cap.* 14. *Dr. & Stud. l.* 2. *c.* 39. *Cowels Inſt. p.* 125. *F. N. B. deviſe* 5. *& Exer.* 108. *Swin. part* 3. *ſect.* 6.

171. The Husband cannot deviſe ſuch Goods as his Wife hath, as being Executrix to another; nor ſuch things as are in Action, as debts due to her before Marriage by Obligation or Contract, unleſs he and his Wife ſue and recover the ſame during Marriage, or that he renew the Bonds, and take them in his own Name; otherwiſe after his death they remain to her. *Co. on Litt. fol.* 351. *b.* 9 *H.* 6. 52. *&* 21 *H.* 7. *fol.* 29. *Kitchin, fol.* 251. *a. Finches Law, pag.* 44. *&*

168. *Bro. Testam. 11. Swin. part 2. sect. 9. num. 13.*

172. Also if the Husband be possessed of a term or Lease for years in right of his Wife, he cannot devise it by his Will, but he may grant it away, or dispose of it in his life-time; or, if he make no disposition thereof, yet if he survive her, then it falls to him; and in such Case he may devise it by Will. *Dame Hales ca. Ple. Com. fol. 260. Co. on Litt. fol. 251. a. Kitchin, pag. 267. b. 7. H. 6. 1. Perkins, sect. 560. Dr. & Stud. l. 1. c. 7.*

173. An Administrator cannot devise those Goods by Will, which he hath as Administrator to another person dying intestate, but Administration thereof shall be committed to the next of Kin to the first intestate; neither can an Executor devise those Goods by way of Legacy, which he hath as Executor; but he may make his

Te-

Testament, and appoint another Executor, who shall have the Administration of the same Goods, to the use of the first Testator. *Fynches Law, pag. 168. Bro. Adm. 7. F. N. Bro. Adm. 3. 31 E. 3. cap. 11. Plo. com. fol. 525, 526. Swin. part 3. sect. 6.*

174. Those things also which belong to the Heir after the Testators death, cannot be devised by Will, as Glass-windows, Wainscote, Tables dormant, and Benches affixed thereunto, or mortised in the Earth; Furnaces, Coppers, Leads, Ovens, *&c.* set in Mortar or Stone; nor Trees, nor Grass-growing, *&c. Bro. Exer. 65. Cowel Inst. p. 140. Co. 4. Rep. fol. 62. Swin. part 3. sect. 6. Noyes Max. pag. 106.*

175. But Corn growing on the Land at the time of the Testators death, may be devised by Will, by those who are seised in Fee-simple, Fee-tail, or for life; and also by

Tenant

Tenant in Dower, Tenant by the Curteſie, and Tenant in Mortgage, and their Tenants; and he who is ſeized in the right of his Wife, although their Eſtates do determine before the ſaid Corn be ripe and ſevered, except in ſome ſpecial Caſes. *Perkins, ſect.* 512, 514. & 522. *Dr. & Stud. l.* 1. *c.* 20.

176. If a woman Tenant in Dower ſow her Land, and afterwards marry, and the Husband dies before ſeverance of the Corn; in this Caſe it remains to her, and he cannot deviſe it: but if it had been ſown after the Marriage, he might have deviſed it. *Clerk of Aſſize, pag.* 57. *Abr. Dr. & Stud. l.* 1. *c.* 20.

177. If Tenant for life have Hops growing, and die a little before the ſeverance of them; in this Caſe the Executors or Adminiſtrators ſhall have them, and not be in Reverſion or Remainder, for the Hops are accounted as Emble-

ments,

ments, they growing by Manurance and Industry of the Owner, by the making of Hills, and setting of Poles. *Vide Mich. 11 Car. 1. B. R. Latham and Atwoods Case, Cro. 1 part fol. 396.*

178. As Goods and Chattels may be devised, as aforesaid; it is now further observable what a quantity or proportion of Goods and Chattels, the Testator may devise by his Will: observe therefore, that if the Testator have neither Wife nor Childe at the time of his death, he may then dispose and devise all the clear residue of his Goods and Chattels, over and above the discharging Funeral-expences and his debts. *Lindwood in C. Statut. de Testament. l. 3. Pro. Const. Cant. verbum defunct. Brac. l. 2. c. 26. Swin. part 3. sect. 16.*

379. But it is the custom of many places, especially within the Province of *York*, that if the Testator have

have a Wife or Childe, at the time of his death, that then he can but dispose of half of such his clear Goods, and the other half is to go to the Wife or Childe; and if he have both a Wife and Childe, or Children at the time of his death, then the Goods are divided into three parts; whereof one part is to the Wife, another to the Child or Children, and the other third part, called the deaths part, is left to his disposing; and if no disposition be made thereof, it falls to the Executor: but note here, that if the Childe or Children were Heir to the Testator, or were advanced by the Testator in his life-time, then the Testator may devise one half of the clear Goods, and the other half shall go to his Wife. *F. N. B. Bre. de Rat. part. Bonor. Bro. eod. tit. N. 6. M. 7. E. 4. fol. 21. 4. Brac. l. 2. c. 26. Fleta, l. 2. c. 50. Glan. l. 2. c. 20. Co. 2 part Inst. fol. 33. Swin. part 3. sect. 16. Refor. Legum Eccl. tit. Test. c. 10.*

180.

180. Note, where the Wife and Children ought to have a rateable part of the Goods of the deceased, be it third part or half, as the case is; there also they ought to have a like part of the debts due by the deceased, after they are recovered by the Executor or Administrator; but of Leases they can have no rateable part, where they use to have a rateable part of the moveable Goods and Debts recovered, unless it be by special Custom of the City, County, Deanry, or place where the Testator dwelled, and had such Leases. *Swin. part 3. sect. 16. F. N. B. Breve de Rationabl. part. bon.*

181. This rateable part of the Goods to the Wife and Children, is saved to them by the Statute of *Magna Charta*; but note, the Wife or Children cannot sue the Executor or Administrator for their rateable parts, till all the Testators Debts be paid; and then what remains

mains is to be divided according to the Rules aforesaid, into two or three parts, before any Legacies be paid, for they must all be paid out of the deaths part after the division *Magna Charta, c. 18. Regist. fol. 42. b. F. N. B. 122. b. M. 7. E. 4. fol. 21. a. 2 part Inst. fol. 33.*

CHAP. VIII.

Several Cases concerning the bequeathing of Legacies, and also touching Devises.

182. AS an Executor may be appointed divers ways, as is shewed before, *chap. 5.* so also a Legacie may be given after divers ways, either simply or conditionally, *&c. Swin. part 4. sect. 3. num. 2.*

183. That Legacie is said to be pure and simple, which is given without a condition annexed to it: and as in appointing an Executor, it matters not after what form of words it be, so it is in the bequeathing of a Legacie, for it skills not after what form the same be given, so that the Testators meaning do but appear whether it be in Goods and Chattels, or Lands and Tenements. *Swin. part 4. sect. 4. num. 18.*

184. Note, that a Legacie may be given from a certain time, or until a certain time, albeit the Legatary die in the mean time, before the day come, yet the Executors or Administrators of the Legatary may recover the same when once the day is past, as the Legatary himself might have done if he had lived so long; unless the meaning of the Testator be to the contrary, or that it be such a thing as cannot be transmitted to the Executor,

as

as personal service: but if the Legacie be given after an uncertain time, as where the Testator gives thee an hundred pounds when his Son shall die, or the like; there if thou die before the time come, thy Executors or Administrators can then recover nothing. So note the diversitie. *Mich. Graff. thesaur. theor. opin. sect. Legat. quæst. 43. Mantica de conject. ult. volunt. l. 11. tit. 20. num. 8. Swin. part 4. sect. 17. Refor. Leg. Eccles. tit. Testament. c. 26.*

185. If a man devise to his daughter an hundred pounds when she shall be married, or to his Son when he shall be of the Age of twenty one years; here if they die before the time appointed, their Executors shall not have it: But if the devise were of an hundred pounds to the daughter, to be paid her when she shall be married; or to the Son, to be paid him when he shall attain the age of twenty one

one years; in such case, if they die before such time, then their Executors may recover the Legacie. *Tr. 1653. B. R. in Dumlowe & Shams & Hughes grand Abridg. 1 part, p. 664. in 14.*

186. Note that a Legatary may not of his own Authority take the Legacy, and serve himself, but must receive the same at the hands of the Executor, except in some cases, as where the Legatary is possessed of his Legacy at the time of the Testators death, for in such cases, he may retain and keep it, if there be sufficient Assets besides in the Executors hands to pay the Testators Debt; or, if the Testators give license to the Legatary to enter to his Legacie, then he may do it without the Executors consent, and if he be both Legatary and Executor, then he may serve himself. *Perkins, sect. 488. Hernes Law of Con. pag. 88. Socin. Jun. Consil. 111. vol. 1. Swin. part 2 sect.*

sect. 4. num. 23. Perkins, sect. 570, 572, 573.

187. But the Legatary hath no remedy by the Common Law for any Legacie of goods to him bequeathed, if the Executor will not deliver the same: but he must in this case have a Citation for the Executor, to appear before the Ordinary, or other competent Ecclesiastical Judge, to answer him in cause of his Legacie, except in case, where a particular thing is bequeathed, as the Testators Horse or Signet, *&c.* and in such case, the Legatary may sue at Common Law for the same. *Bro. devise, num. 3, 6, 14, 27, 30. Terms of the Law, verbum Devise. Swin. part 4. sect. 4. num. 23.*

188. Also if the Testator will that his Executors shall sell his Land, and pay such and such Legacies out of the Moneys; in this case the Legataries may sue at Common-Law, and not in the Spi-

Spiritual Court for their Legacies. *Mich. 5 E. & M. Dyer, fol.* 151, 152. *Vide M.* 29. *& 30 Eliz. C. B. Gerneys Case. Leon. Rep. fol.* 87. *& Tr.* 17 *Jac. C. B. Rott.* 895. *Edwards & Graves Case. Hob. Rep. fol.* 265.

189. But if the Legacies be granted to be paid out of Leases, and not out of Fee-simple Lands; then the Legatary may sue in the Spiritual Court for such Legacies. *Brownlows* 1 *part Rep. fol.* 34.

190. *Testamento cum duo inter se pugnantia reperiuntur, ultimum ratum est.* If there be divers devises of one thing in one Will, the last devise taketh place only. *Co. on Litt. fol.* 112 *b.*

191. If the Testator bequeath to *A B* all his Goods; in this case it is the opinion of some, that *A B* shall have the Testators whole Estate actively and passively, (only his Lands, Tenements, and Freehold

Freehold excepted) being in effect, his Executor or Heirs, as the Civil Law terms him, and is hereby chargeable with the Testators Debts so far as the Goods will extend. *Gloss. in L. his verbis sect. de Hæred. Instit. Swin. part 7. sect. 10.*

192. But others are of opinion, that if a man grant *omnia bona*, (that is, all his Goods,) in this case, Leases for years, nor a Ward, nor things in Action, as debts upon Promise or Obligation, shall not pass thereby; for these are Chattels. *4. E. 6. Bro. 10. Grant. 51. & Done 43. Kitchin p. 44. b.*

193. But if the Testator do bequeath to *A B* all his Chattels, in such case he shall have the Testators whole Estate, Leases and Wards too; for *Catalla* includes all but freehold, as well immoveable as moveable. *Standford. de præro. Regis, cap. 16. Kitchin Court-*

Leet,

Lex, pag. 45. a. & 46. a. Swin. part 7. sect. 10.

194. But note, that *A B* by such devise shall not have Glass of the Windows, Wainscote, Tables dormant, Fats in the Brew-house fixed to the Free-hold; nor Furnaces, nor the Box or Chest wherein the Testators Evidences are; nor Hawks, nor Hounds, nor Doves in the Dove-house, nor Fishes in the Pond, nor Deer in the Park: for these things belong all to the Heir. *Fynch. pag. 22. Noyes Max. pag. 101. and 107. Vide Hill. 43 Eliz. C. B. Gray and Trowes Ca. Goldesbor, Rep. pag. 129. pl. 24. 18 E. 4. fol. 14. 4 H. 7, 10. And 21 H. 7, 26. Kitchin, pag. 45. b. 46. a.*

195. Note also, that if *A B* dye before he have proved the deceased's Will, wherein he bequeaths to him all his Goods, or all his Chattels, as aforesaid; yet in such case Administration shall be committed to the next of Kin to the said *A B*,

and not to the next of Kin to the Testator, 23 *Eliz. Dyer, fol.* 373. *Swin. part* 4. *sect.* 10.

196. But if the Testator, in either of the Cases, make another man Executor; then the Legatary shall not enter into the whole estate of the deceased; but the Executor proving the Will, is to enter, and may receive or sue for all the debts due to the Testator, and stands also chargeable with the payment of the Testators debts, and what remains is due to the universal Legatary. *Mich. Graff. theſaur. com. opin. ſect. Inſt. q.* 14. *num.* 3. *Swin. part* 7. *ſect.* 10.

197. If the Testator bequeath to *A B* all his moveable goods, here the Legatary may recover all the Testators personal Goods and Chattel, both quick and dead; which either move themselves, (as Horses, Sheep, Oxen, Swine, *&c.*) or can be moved by another, as Houshold-stuff, Plate, Plough-geer,

Waynes

Waynes, Carts, Corn in the Barns or Garners, and also Corn growing on the ground: And such Debts as were due to the Testator, and did arise by reason of such moveable things, and for recovery whereof there lieth an Action personal, do belong also to the Legatary; but the Legatary cannot sue for the same in his own Name, if another man be made Executor; but the Executor must sue for the same, and after recovery, deliver the same to the Legatary. *Paul. de Castrens. Consil. 132. vol. 1. Socin. Jun. Consil. 60. vol. 1. Stamf. 45. Swin. part. 7. sect. 10. Noyes Max. pag. 99. Mich. Grass. thesaur. com. opin. sect. Legat. quæst. 19.*

198. But where the Testator doth bequeath to *A. B.* all his Goods immoveable, here the Legatary hath right only to the Leases for years, which did belong to the Testator, and to such benefits as

arise thereby; as Fruit on the Trees, Grass growing on the Ground, Fishes in the Pond, and Pigeons in the Dove-coat, as appurtenant to the Grounds demised, or as parcel of the fruits of the Tenements, (which if they were out of Lease,) did belong to the Heir; but as to Corn growing on the Ground, or other Fruits Industrial, as Hemp, Lyme, &c. Turneps, Carrets, or other Roots, they are accounted amongst the moveable Goods, and such Legatary shall not have them; but he shall have such Debts as were due to the Testator, by reason of something immoveable, as Rents due out of Leases, or Arrearages of Rents due out of Lands, Tenements and Hereditaments; but he cannot Commence Suit in his own Name, if another be made Executor, as is shewed before, number 197. *Cowell Interp. verb. Chattels. Kelloway, Rep. fol. 118. Stamp. cap. 16. fol. 45. Mich. Grass.*

Sum. Tom. opin. sect. Legatum. q. 19. num. 5. Swin. part. 7. sect. 10. pro. Executor. 49.

199. If the Testator bequeath to thee all his Houshold-stuff, in thi case thou shalt have all his Tables, Forms, Stools, Chairs, Trunks, Chests, Cupboards, Bedsteads, Curtains, Vallens, Rugs, Blankets, and all manner of Bedding; and also Hangings, Carpets, and all manner of Linen, as Sheets, Table-Cloths, &c. Basons and Ewers, Candlesticks, Salts, Flaggons, Pottingers, Sawcers, &c. Bowls, Barrels, and all manner of Vessels, serving for meat or drink, whether they be of Earth, Wood, Glass, Pewter, Brass, or Silver, or Gold, if they were used in the daily service of the House, and not kept for Ornament only; and also Pots, Pans, Spits, Racks, and the like: and lastly, Coaches by some are held to pass by the name of houshold-stuff. *Menoch. de præsum. l. 4. præsum.*

160. *num.* 8, 16, 17. *and* 19. *And Præsump.* 122. *num.* 21. *Panor. Consil.* 88. *vol.* 2. *num.* 3. *Swin. part* 7. *sect.* 10.

200. But Apparel, Books, Weapons, Artificers tools, Cattel, Victuals, Corn in the Barn or Granary, Waynes, Carts, Ploughs, &c. and Vessels affixed to the Erce, hom, do not pass by the name of Household stuff. *Menoch. de Præsump.* l. 4. *Præsump.* 160. *num.* 29. *and* 33. *Labro. And Gloss. de Supellectil. Swin. part* 7. *sect.* 10.

201. If the Testator, having store of young Colts, willeth his Executor to give to *A B* two Colts of the age of two years, and after the making of his Will liveth many years, in this case there is due to the Legatary two of the first Colts, which were extant at the time of the Will making, and not of the last Colts at the time of his death. *Franc. Mantica de conject. ult. volunt. l.* 5. *tit.* 11. *Menoch. de Præsumpt.* 127.

numb. 6. lib. 4. Swin. part 7.
sect. 11.

202. And if the Testator bequeath to *A B* all his Goods, which are in such a place, and afterwards he brings more Goods thither, and then dies; here the Legatary shall have only those Goods which were there when the Will was made, and not those Goods which were brought thither afterward. *Menoch. de Presumpt. 127. num. 29. l. 4. Swin. part 7. sect. 11.*

203. But if the Testator had said, I bequeath to *A B* all my Goods which shall be in such a place, or all my Goods which may or can be found in such place; here all the Goods, in that place at the time of the Testators death, are due to the Legatary, though they were brought thither by the Testator after the making of his Will. *Franc. Manica de conject. ult. Volunt. li. 3. tit.*

tit. 11. num. 12. Menoch. de Præsumpt. 127. num. 87. l. 4. Swin. part 7. sect. 11.

204. If the Testator bequeath to *A B* his Herd of Cattel, and there is but one left at the time of his death; in this case the Legatary can recover no more. *Swin. part 7. sect. 11. Simo. de Præt. de Interp. ult. Volunt. l. 4. fol. 179. Dubit. 9. num. 45.*

205. Where the Testator doth bequeath to *A B* the Corn in his Barn, and afterwards layeth up more Corn in the Barn, and dyeth before the other be thrashed; in this case the Legatary can but have onely that Corn which was there at the time of the Will making; but if that be all spent before the Testators death, then he may recover as much of the new Corn, but no more. *Fulb. fol. 41. Plo. Co. fol. 341. Maschar. de Probat. Conclusio 1280. num. 32. 33. Swin. part 7. sect. 11. Cowels Iustit. p. 145.*

206.

206. So note, that it appears by these cases, that sometimes the Testators death is to be taken notice of, and sometimes the making of the Will is to be respected in the recovery of Legacies: but in these and all other cases the Testators meaning is chiefly to be enquired after. *Franc. Mantic. de conject. vir. volunt. l. 3. tit. 11. num. 22, 23, 24. tit. 19. num. 1, 2, 3, 4. Swin. part 1. sect. 3. num. 19. and part 7. sect. 11.*

207. If the Testator bequeath all his clear Goods after Debts paid, &c. to his Brother and his Children; in this case the Father shall have half of the clear Goods, and the Children the other half: for it is a Rule, that where divers persons are comprehended under one Name collective with another third person, then all they which be included under that one Name, do represent but one only person, as in this case, and shall have

but a Moiety amongst them, unless it be proved that the Testators meaning was, that the Goods should be equally divided amongst them; or, that he expressed it so in his Will. *Paul. de Castr. sect. de Hered. Instit. Fra. Mantica de conject. ult. vol. l. 4. tit. 9. Swin. part. 4. sect. 20.*

208. If the Testator bequeath to the Childe in the Mothers Womb an hundred pounds, in this case, if the Mother bring forth two or three Children at that time, the Legacy is to be divided amongst them. *Fran. Mant. de Con. ult. Volunt. l. 4. tit. 8. num. 4. Swin. part 4. sect. 20. Paul. de Castr. sect. in li. Qui Filiabus.*

209. But if the Testator say, *If my Wife bring forth any Childe, I give to the same an hundred pounds*, here if she bring forth two or three Children at that time, then every Childe shall have an hundred pounds if the Testators Goods do

suffice

suffice to satisfie the same, unless it be sufficiently proved, that it was the Testators meaning, that they should have no more but an hundred pounds amongst them. *Swin. part 4. sect. 20. num. 17. Text. in D. sect.*

210. If the Testator bequeath to the Child in the Mothers Womb, if it be a Man-child, two parts of his clear Goods; and if it be a Woman-child, then the Mother to have two parts of his clear Goods, and the Child but one, and afterwards the Mother brings forth two Children, both a Man-child and a Woman-child; in this case the Son shall have twice as much of the Testators clear Goods as the Mother, and the Mother shall have twice as much as the Daughter: as for example, the clear goods amount to seven score pounds; here the daughter shall have twenty pounds, the mother fourty pounds, and the son fourscore pounds; whereas,

if

if she had brought forth onely a Son, then the Son should have had fourscore and thirteen pounds six shillings and eight pence, and the Mother six and forty pound thirteen shillings and four pence: and if she had brought forth onely a Daughter, then the Mother should have had fourscore and thirteen pounds six shillings and eight pence, and the Daughter forty six pounds thirteen shillings and four pence. *Franc. Mantica de conject. ult. Volunt. l. 4. tit. 9. num. 12. Swin. part 4. sect. 20.*

211. But if the Testator bequeath to the Child in the Mothers Womb, if it be a Man-Child, two parts of his Goods, as aforesaid, and the Mother one; and if a Woman Childe, then the Mother two parts, and the Childe but one; and the Mother brings forth an Hermaphrodite, who hath both the parts of a man and a woman; in this case the Hermaphrodite shall have only the Portion due to that

Sex

Sex of which the Hermaphrodite doth most participate, and not the Portion due to both Sexes: and if it be doubtful of which Sex it doth most participate, then it shall be presumed according to the more worthy kinde. *Swin. part 4. sect. 20. num. 19. Co. on Litt. fol. 8. Phillips Pr. of Law, p. 36.*

212. If the Testator give an hundred pounds to the Children of *A B*, who hath four Children at that time of the Will making, and afterwards before the Testators death, *A B* begetteth other four Children, so that he hath eight Children in all; yet in this case those four only which were born when the Will was made, shall have the hundred pounds, and the other four shall have nothing out of it. *Simo. de Prætis. de Interpret. ult. Voluntat. lib. 4. dub. 9. fol. 178. Menoch. de Præsumpt. l. 4. Præsumptio 127. num. 18.*

213.

213. If the Testator bequeath an hundred pounds lying in such a Chest to *A B*, and there is no money in the Chest; here the Legacy is void, unless the Testator say, I give to *A B* an hundred pounds, and I will that the same be paid out of the Moneys which I have in such a Chest, or of the Money which such a man doth owe me; in such Case, although there be no money in the Chest, nor any due by the person named by the Testator, yet the Legacie is due and ought to be paid out of the Testators Goods. *Swin. part. 7. sect. 5. num. 15. Mich. Graff. the same com. opin. sect. Legat. quæstio 59. num. 3.*

214. And where the Testator doth bequeath ten pounds to *A B*, remaining in such a Chest, and at his death five pounds only is found in the same Chest; in this case the Legacie is good for so much as is found in the Chest, and no more.

Swin.

Swin. part. 7. sect. 7. num. 15. Rebuf. de Cassis in Dissect. quinque, num. 9.

215. If the Testator do imagine himself to be indebted to another person, and doth bequeath that debt to the same person, which he erroneously supposeth he oweth him, not expressing any sum, in this case the Legacy is void: but if he say, *I do bequeath ten pounds to such a person, which I owe him*, whereas the Testator knows he owes him nothing; yet in this case the Legacie is due, notwithstanding the false demonstration; and here the Testator is not presumed to err, unless the Executor make proof of error. *Paul. de Castr. in l. 2. C. de falsa causa adject. Swin. part 7. sect. 5. num. 14.*

216. If the Testator meaning to give but fifty pounds, doth give an hundred pounds; or meaning to give an hundred pounds, doth give but fifty pounds: in these cases

the Legatary may recover as much as the Testator did mean and intend to give, be it more or less then the sum mentioned. *Swin. part. 7. sect. 5. num. 13.*

217. If the Testator bequeath an hundred pounds to the Church, not mentioning what Church, it shall then be understood of his Parish Church; or if he name a Church, and there be divers there of the same name, and none of them his Parish Church; then the Executor, if he prove the Will, or the Ordinary, if he refuseth, may bestow the same on which Church he will: but if the Testators Parish Church be of the same name, it ought then to be bestowed there. *Mich. Grass. thesaur. com. opin. sect. Legat. q. 64. Swin. part. 7. sect. 8. Franc. Mantic. de conject. ult. vol. li. 8. tit. 6.*

218. Were the Testator doth bequeath one half of his Goods to one person, and makes another his Executor, willing and appointing that

all

all his Goods shall be divided betwixt them; in this case the Legatary shall have half before debts paid, and the Executor the remainder after debts paid: as, where the Testator hath Goods to the value of an hundred pounds, and oweth twenty pounds out of the same; here the Legatary shall have fifty pounds, and the Executor shall pay the twenty pounds debt out of his half. 5 *Maria, Dyer fol.* 164. *Goldesborough Rep. pag.* 149. *Pl.* 74. *Hil.* 43 *El. C. B. Swin. part.* 7. *sect.* 10. *cowels Inst. pag.* 146.

219. If a man bequeath twenty pounds to *A*, and twenty pounds to *B*, and twenty pounds to *C*, and make his executor, and dyes, having Goods in all but to the value of twenty pounds, of which Goods the Executor makes an Inventary; in this case he may pay which of the three he pleases his whole Legacie, and the other two are without remedy; or he may, if he please, pay every

every one of them a rateable part: and if in case the Executor make no Inventarie, yet he is chargable no further then the value of the Goods; and so if every Legatary in such case should sue him, they must prove sufficiency of Goods, or otherwise they should get nothing. *Plo. com. fol. 345 in Case inter Parham and Yardly. Dr. and Stud. li. 2. chap. 20.*

2no. If the Testator say, *I will that* A B *shall have an Horse*; here the Election belongs to the Legatary: but if he be had said, *I will that my Executor give to* A B *an Horse*, then the Election belongs to the Executor; and if the words of Election be directed to niether of them, then the Legatary shall make the Election, if there be any such thing extant amongst the Testators Goods as is bequeathed, and if not, then the Executor is to make the Election: and in case where the Legatary chuseth, he

he must not take the very best, unless there be no more but two of the things extant; for then he may chuse the best, and so he may do when the Testaror grants him the Election; and as the Legatary may not chuse the best, neither may the Executor obtrude the worst of those things extant; and where there is no such thing extant, then the Executor is to provide a competent thing for the Legatary. *Mich. Gross. thesaur. com opin. sect. Legat. q. 62. num. 2. and 3. Minsi. in D. sect. si generaliter, num. 6. Swin. part 7. sect. 10. Co. on Litt. fol. 144. b.*

221. If the Testator bequeath two Horses to two Men, having no more, and one of them is a great deal better then the other; in this case he that is first named in the Testament shall have the Election. *Co. on Litt. fol. 144. b. 2 H. 7, 23. Swin. part 7. sect. 10.*

222.

222. If the Testator give to A B twenty pounds if he will, in such case A B must express his willingness by some means, or else the Legacy is not due; and if he die before such expression, then the Legacy is lost, and shall not go to his Executors or Administrators, which otherwise it would, if no such condition had been expressed. *Swin. part 4. Sect. 6. num. 7.*

223. If an Executor have a Legacy left him by his Testator, and refuseth to stand to the Executorship, in such a case he loseth his Legacy. *Gribald. Thesaur. com. opin. verb. Tutor. Swin. part 6. sect. 2. in fine. Refor. Leg. Eccles. Tit. Testamens. C. 23, and 24.*

224. But if the Executor be not duly admonished to take the Executorship upon him, then if he be the Testators Kinsman, or such a person to whom the Testator would have given the Legacy, though he did not perform the Will, and take the

Office

Offices upon him, in such case he shall not lose the Legacy then, by his refusal of the Executorship; neither shall the Wife lose her third, nor the Children their filial portions, nor the Creditor his debt, if any of them be made Executors, and refuse to take the Office upon them. *Swin. part 6. sect. 3. num. 5. Richard in lib. Sic legatarius cap. de legat.*

335. If a man by his Will devise all his Lands and Tenements to *A* and his heirs, in this case, not only all his Lands and Tenements which the Testator hath in possession do pass, but also those which he hath in reversion also, by vertue of the word *Tenements. Terms of the Law, verb. Devise, Cowels Inst. p. 144. Swin. part 4. sect. 4. num. 19.*

336. But if the Testator have lands in fee, and lands in Lease for years, and deviseth all his lands and Tenements, in such case the lands in Fee

Fee-only pass, and not the Lands in Lease for years; but if he have none but lands for years in Lease only, then those lands shall pase by vertue of such devise. *Tr. 7. Jac. B. R. Rose and Bartlett Case. Cro. 1 part Rep. fol. 213. Noys Maxims pag. 99.*

227. if lands be devised to a man to have to him for evermore, or to have to him and his Assigns, in both these cases a Fee-simple doth pass to the Devisee: but if such a Gift or Grant were made by Deede, it would carry an estate but for life, without the word *Heirs* were in it. *Perkins, sect. 557. M. 22. E. 3. Devise. 20. Terms of Law; verb. Devise. Swi. part 4. sect. 4. nu. 19.*

228. Also if a man devise his lands to another, to give, or sell, or do therewith at his pleasure; here he hath a Fee-simple also; and if lands be devised to one and his Heirs males, this shall amount to an Estate in tayl; but

if

if such words be in a Feoffment, it shall be taken for a Fee-simple, because it doth not appear of what body the heirs Males shall be begotten. *Terms of the Law, verb. Devise, Cowel. fol. 9. b. Swin. part 4. sect. 4. Cowels Inst. pag. 144.*

229. Also if one devise to an Infant in the Mothers womb, it is good; but such a Feoffment, Gift, or Grant is void: and if one will that his Son shall have his land after the death of his Wife, in this case the Wife (by the favourable interpretation of such Will) shall have the land for term of her life. *Finches Law, pag. 171. 13 H. 7. 13. Terms of the Law, verb. Devise. Cowels Inst. pag. 144. Swin. part 4. sect. 4. Noys Maxims, p. 109.*

230. If a man devise all his lands in *A* to his two daughters, and makes them Executrixes, and afterwards purchaseth more lands in *A*, and then dies without a new publication of his Will, and expressing of this

land

land newly bought therein; in this case the land newly bought doth not pass by the same Will. *H.43. El.C. B. Beckford and Parncotes Case. Goldsboroughs Rep. p.150. pl.77.*

231. A man having four daughters, *A*, *B*, *C*, and *D*, devises his lands to his Wife for her life, and after her decease the same to be equally divided amongst his Daughters, or their Heirs; *A* one of the Daughters died before the Mother, and after the Mothers death the heir of *A* sued for a fourth part, and adjudged for the Heir by vertue of the disjunctive (or) but if it had been to have been divided amongst his Daughters (and) their Heirs, this word had altered the case, and would have given the Fee to the three surviving Sisters. *Mich. 1 Car. 1. B.R. Rot. 189. Taylor and Hodgskies Case. Godbolts Rep. fol. 363.*

232. If one devise his lands to another Man and his Heirs, and the Devisee dieth in the life-time of the

the Devisor, and afterwards the Devisor dieth; in this case the Heirs of the Devisee shall not have the land. *Plo. com. fol. 342. in Brett and Rigdens Case.*

233. If a man seized of lands in Fee, sowe the same with Corn, and afterwards deviseth the land to *A B*, and dieth before the Corn be severed; in this Case the Devisee shall have the Corn as well as the Land: but it is otherwise where the Lands descend to the Heir; for the Executors or Administrators shall have the Corn sown at the Testators death. *Mich. 20. Jac. C. B. Spencers case, Winches Rep. fol. 51.*

234. A man devised his Messuage, whereof he was seised in Soccage in Fee, by these words: *I devise my Messuage where I dwelt to my Cozen* H *and her Assigns for eight years, and my Cozen* H *shall have all my Inheritances if the Law will*; and this was adjudged a good de-

wife in Fee of the Meſſuage, and by the general words of the Will all the Inheritances paſs alſo. *Mich.* 11 *Jac. C. B. Wedlock and Hardings Caſe. Godbolts Rep. fol.* 208.

235. If a man deviſe his Lands to the Heirs-Males of any of his Sons or next of Kin, ſuch a deviſe is void for the uncertainty thereof. *Hil.* 2 *Car.* 1. *C. B. Rott.* 288. *in Hunt and Fiſhers Caſe; and Trin.* 1649. *B. R. Rott.* 849. *Beal and Wymans Caſe. Styles Rep. fol.* 240.

236. A man having Lands in Fee-ſimple, and Goods to the value of five pounds only, deviſeth to his Wife all his whole Eſtate, paying his Debts and Legacies, which amounted to forty pounds; in this caſe it was adjudged, that all the Lands did paſs by the deviſe, and that the Wife had a Fee-ſimple in the Lands, the word (paying) enforcing it, for they are to be paid preſently, which cannot be if the Land paſs not in Fee. *Tr.* 1651. *B. R.*

B. R. Kirman and Johnsons Case. Styles Rep. fol. 293. and see 29 H. 8. Bro. Testament. 18.

237. *A* seized of three Houses, and other Lands, Pastures and Medows in *W* in the County of *H*, and of Land in the County of *O*, devised in this manner, *viz. I give my Capital Messuage in the County of O, and all other my Lands, and Medows, and Pastures in the Parish of W, to such an one*; and adjudged here that all the houses passed by the devise; for that *Lands* comprehends houses also. *Ewer and Heydons Case. Abr. Moros Rep. pag. 103. pl. 468.*

238. If a man devise the profits of his lands, it is a devise of the lands themselves. *Tr. 16 Jac. C. B. Rott. 465. Balder and Blackburnes Case. Brownlo. 2 part 79. Owens Rep. 66. Tr. 23 Car. Styles 11.*

239. A man by his Will devisth his lands to his Wife, and if she

have Issue by the Devisor, that his Issue shall have it at his age of twenty one years; and if the Issue die before that age or before his wife; or if she hath no Issue, that then she shall chuse two Attorneys, and she to make a bill of Sale of any lands to her best advantage: In this case it was resolved, that the wife hath those lands for life; and she having no Issue, hath not any interest to despose, but hath an autority to nominate two who shall dispose of the lands, and they shall make sale of them. *Mich 5 Jac. B. R. Beal and Shepherds case. Bro. 2 part Rep. fol. 199.*

240. I might go on to shew what words in a Devise make a Condition, and what a Limitation; and where an estate shall pass by Implication, and what words make an estate Tayl, Fee-simple, or for Life; and where the Devisees shall be Joyntenants, and where Tenants in Common, with several

other

other things; but it not being the intent of this Treatise, I refer the Reader to the learned Reports now extant, where he may be satisfied: and so I return again to my purpose.

241. Devises and Legacies are to be sued for in the Ecclesiastial Court, but the Ordinary cannot take Cognizance of Fees or Freehold devised; but a Prohibition will lye, if any Judge of any Spiritual Court shall cite one before him in case of such a devise as intrencheth upon the Common Law. *Perkins, sect. 576, 579. and Dr. and Stud. li. 2. cap. 55. Cowels Inst. pag. 146.*

242. Note, there may be much deceit used by a knavish Executor; and though the Goods be of a great value after the Debts are paid which were truely owing and due by the Testator, yet he may keep the Legacies, and never pay them perhaps, but pretend that all the

Debts are not paid; and thereupon may cause Strangers to sue, and then alledge that there are more Suits against them then the Goods of the Testator are sufficient to satisfie; or they may confess the Actions brought against them; and several other ways there are whereby they may defraud the Legatees of their Legacies. Therefore it were good for Testators in their life-times either to secure the Legacies to the Legatees by some sure means, or otherwise in their life-time to deliver the same, that they see them possessed thereof, and not leave it to the Will of the Executor. *Pepkins, sect.* 571.

CHAP. IX.

Several Cases concerning the Duty of an Executor.

243. THere are three kinds of Executors, or persons which have to deal with the Execution of dead mens Wills, and disposition of their Goods: The first hath his Authority from the Law, and that is the Bishop or Ordinary of every Diocese, who hath the execution thereof, when no executor is appointed by the Testator, or where the Executor doth refuse to take the Office upon him. *Io. de Canibus, Tract. de Executoribus, tit. vol. part 1. q. 3. Swin. part 6. sect. 1. num. 2.*

244. The second hath his Authority from the Bishop or Or-

dinary, and is he whom we call an Administrator, and is put in where the Executor named refuseth, or cannot be Executor, or when no Executor is named in the Will; and if there be a Will, then it must be annexed to the Letters of Administration: and such Administrator is chargeable with the performance of the Will, as if he had been appointed by the Testator. *Cro. Testament* 20. *and Devise* 35. 31 *E.* 3. *cap.* 21. *and* 21 *H.* 8. *cap.* 5. *Swin. part* 6. *sect.* 1.

245. And lastly, the Executor who derives his power from the Testator, is he that is named Executor in the Testament; to whom the Execution of the Testament is committed by the dead man, and is called *Executor Testamentarius*, and hath his Authority immediately from the Testator, and may without the Authority of the Ordinary enter to the Testators Goods and Chattels; and after Probation of the

the Testament, may also Commence Suit against the Testators Debtors. *Plo. Com. in Case inter Gresby and Fox. Bro. Executor 49. Swin. part 6. sect. num. 4. Minsin. in tit. de Hared. Inst.*

246. When the King is made Executor of the Testament of another person, he doth not take the office upon him, but appoints certain persons to take the Execution of the Will upon them, (against whom such as have cause of Suit may bring their Action) and others he appoints to take the accounts, as appears in the Case of *Catherine* Queen-Dowager of *England*, Mother to *H. 6.* who constituted King *H. 6.* her sole Executor; and he appointed certain persons to take the charge of the Will upon them, and others to take their Accounts. *Vide Rott. Parliament. 15 H. 6. num. 32. Co. 4 pars Inst. fol. 335.*

247. When a man makes several

Executors, and they live in divers Dioceses, they shall all receive such benefit as accrues to them by the Testament, only by the Authority of that Judge who confirmed the Testament to them, and the same course is to be taken by the Administrators who live in several Dioceses. *Refor. Leg. Eccles. tit. Testam. c. 37.*

248. Now the Office of an Executor Testamentary doth consist in two things; that is, either in accepting or refusing the Executorship; upon both which parts there are several Cases hereafter following in this Chapter, very necessary for all Executors to know.

249. If he that is named Executor be cited to appear before the Ordinary, and do refuse to accept the Executorship, or will not appear; then the Ordinary or other Judge may commit the Administration of the Goods of the deceased, as if he had died Intestate:

state: but if the Executor afterwards be willing to undertake the Executorship, then the Ordinary may revoke the Administration before committed: but mean acts done by the Administrator, until the Executor undertake, are good and effectual in Law. *Bro. Exer. 49. and 101. and Admin. 32. and 33. 31 H. 8. cap. 5. Ped. Cries by and Foxes Case, Plow. com. fol. Swin. part 6. sect. 2.*

250. Note, that the Executor cannot be compelled to undertake the Office, unless he have already medled with the Testators Goods as Executor; for then he may be compelled to it: and if notwithstanding the do still refuse, and the Ordinary do commit the Administration to him; this refusal is void, and he shall be charged as Executor. And when one shall be said to medle with Goods as Executor,

and

and when not, is shewed afterwards in this Chapter. *Fitz. Abr. tit. Exec. num.* 35. *Olden de Exec. ult. Volunt. tit.* 7. *in fine. Swin. part* 6. *sect.* 2. *Noyes Maxims, pag.* 102. *Hawes Law Convey. pag.* 87.

251 In. Where a term is devised to an Executor, who enters and dies before Probate; yet in such Case the Entry is good Executorship, and his Administrator shall have it. *M.* 29. *El. Dyer fol.* 367.

252. Note, that every one to whom the Testator was indebted, shall have an Action against the Executor so long as the Executor hath Assets in his hands; but a debt due to the Testator shall not charge the Executor as Assets till he hath received it. *Terms of the Law, verb. Executor. Ex. Exec. num.* 112. *Swin. part* 6. *sect.* 13.

253 Where there be divers Executors, their Actions Commenced by them ought to be in all their names; and so must the Action tha

is Commenced against them, name them all; except it be in Case where some of them refuse to take the Office, and the others only prove the Will; for in such Case in Actions brought against them, those only which prove the Will may be named, and the others left out. *Bro. Exec.* 117. *Co. 9. lib. Rep. fol.* 40. *Noyes Max. pag.* 102. *Swin. part.* 6. *sect.* 20. *Perkins, sect.* 485.

354. If divers be made Executors, and some of them refuse, yet he which refuseth may release any debt (before Judgment) which was due to the Testator, and it is as good as if he had never refused, and so a sufficient discharge to the Creditor; for every Executor hath an entire interest; and therefore if two as Executors have a term, and one of them grants all that to him appertains, in this Case the entire Term shall pass. *Co.* 5. *lib. fol.* 28. *Bro. Exec.* 38, 117. *Dyer, fol.* 23. *and*

and 319. *Swin. part* 4. *sect.* 20. *Noyes Maxims, page* 101, 102. *Perkins, sect.* 485.

255. But one Executors relealeasing of Debts, or selling of Goods, shall not charge the other to pay so much of the Goods, if there be not enough to pay debts; but it shall charge the party himself that did so release or convey. *Hernes Law Convey p.* 87.

256. Note that the Executor which refuses may joyn at any time when he will; yea, though it be not till after the death of the other Executor, who proved the Will, contrary to the opinion of *Broke*, and so the Quere in *Dyer* is well resolved. 42 *El. Henslowes Ca. Cr.* [illegible] *l. fol.* 39. *Perkins, sect.* 485. *Dyer, fol.* 360. *num.* 42. *Bro. Exec.* 9. 99. *and* 149. *Swin. part* 4. *sect.* 20. *and part* 6. *sect.* 3.

257. But if divers be made Executors, and they all refuse before the Ordinary, and he grants

Ad-

Administration to another; in such case they cannot then afterwards prove at any time: so not the diversity between one refusing, and all refusing. 42 *El. Henslowes Case. Cu. 9 l. fol. 39. 36 H. 6. Finches Law, pag.* 17. *And Vide Bevacorne and Cates Case, Mores Rep. fol.*

1298. If two be appointed Executors, and one of them refuses, and the other takes the Office upon him, and then dies, and makes his Testament, wherein he names the Executor; in this case the Executor of the Executor cannot joyn with the surviving Executor, neither in the Execution of the first Testators Will, nor in Suits or Actions: and if the Executor of the Executors have any Goods in his hands of the first Testators, the surviving Executor may have an Action against him for the same: and if the surviving Executor do afterwards die intestate, yet cannot the Executor of the Executor meddle

with

with the Goods of the first Testator; but Administration thereof is to be committed to the next of Kin to the Testator; and if the Executor of the Executor, or who died first, meddle with the Goods, then he may be sued by the Creditors, as Executor in his own wrong. *Ero. Exec.* 92, 99, 149, 160. *Swin. part* 4. *sect.* 20.

259. If one make another his Executor, and dieth; and the Executor before he hath proved the Will, maketh another his Executor, and dieth; in this Case Administration of the first Testators Goods, with the Will annexed, shall be committed to the next of Kin of the first Testator, and not to the Executor of the Executor, unless the first Testator did bequeath his Goods (as his Debts, Funeral-expences, and Legacies paid) to the Executor named in the Testament; and then in such case the Administration of the first Testa-

tors

tors Goods is to be committed (with the Will annexed) to the Executor of the Executor. *Dyer, fol.* 372. *num.* 42. *M.* 23. *El. Ifted. Co. Swin. part* 6. *sect.* 3.

260. Note, that if divers be appointed Executors, and one of them doth sell some of the Testators Goods for a sum of money; then that Executor which sold the Goods may sue alone for the money due for the same. *Swin. part* 4. *sect.* 20. *Bro. Exec. num.* 65.

261. Where divers persons are made Executors, and the Testator gives them power to sell his Lands; in this case, though some of them die, or do refuse the Executorship, yet the others who take upon them the charge and burden of the same Testament and Will, may sell the Lands, except in some Cases. *Perkins, sect.* 545. *Pasch.* 46 *E.* 3. *Dewf.* 8. 21 *H.* 8. *cap.* 4. 39 *Ass. pl.* 17. *Co. on Litt. fol.* 113. *Swin. part* 6. *sect.* 3. *Dyer, fol.* 371. *See Howel*

and

and Barnes Case, Mich. 10 Car. Cro. 1 part.

262. As, where the Testator deviseth, that after his death his Lands shall be sold by his Executors, with the assent of *A B*; maketh his Wife and a Stranger his Executors, and dieth, and then the Wife dieth, and *A B* also; in this Case the Authority of selling the Lands is extinct, and gone by the death of *A B*, without whose consent it cannot be sold; and therefore if the surviving Executor should sell, such sale is void. *Brownlowes 2 part Rep. fol. 100. Mich. 5 Eliz. Dyer fol. 219. Fulb. fol. 41. Swin. part 6. sect. 3.*

263. But if a man devise by his Will, that *A B* and *C D*, whom he makes his Executors, shall sell his Land for paiment of his debts, and they refuse to be Executors; yet notwithstanding they may sell the Lands, because they are named by their Proper names; or, if one of the

the Executors dieth, and the other taketh upon him the Executorship, and afterwards selleth the Lands, such sale is good. 15 *H.* 7, 12. *Perkins, sect.* 548. 19 *H.* 8, 9. *Swin. part* 6. *sect.* 3.

264. But where a man by his Will maketh *A B C* and *D* his Executors, deviseth his lands to the said *A B C* and *D* by their special names, and to their Heirs, and further deviseth that the Devisee shall sell his Lands for payment of his debts, and one of the Executors refuses to intermeddle; in this case it hath been held that this being a special and joynt interest, the other three Executors cannot sell without their Companion. *Mich.* 29 *Eliz. B. R. Bonnifant and Sir Rich. Greenfields Case. Godbolts Rep. fol.* 77. *And see* 26 *El. B. R. Vincent and Leesc se. Co. on Litt. fol.* 113.

265. My Lord *Cooks* advice is to such who devise by their Wills their Lands to be sold, that they make

make it as certain as they can; as that the Sale be made by his Executors, or the Survivor or Survivors of them, if his meaning be so; or by such or so many of them as take upon them the Probat of the Will, &c. and it is better to give them an Authority then an Estate: unless his meaning be they should take the profits of the Lands in the mean time; and then it is necessary that he deviseth that the mean profits be assets in their hands; for otherwise they shall not be Assets. *Co. on Lit. fol.* 113.

266. If a man devise his Lands to be sold by his Executors, and to distribute the Profits to Pious uses, yet after the death of the Testator, the Inheritance shall descend to the Heir, and shall remain in him until the Executors sell the same; and the Heir ought to receive the profits thereof till the time of the sale: but if the Testator devise his lands

lands to his Executors, which he willeth to be sold, and the money to be distributed to pious uses; here the Executors after the Testators death shall receive the Profits and not the Heir; for in the first case the Executors have only an Authority to sell, and in the last case they have the frank-tenement. *Brownl. 2 part Rep. fol.* 136. *Noyes Max. pag.* 100, 101. 38. *Ass. Pl.* 3. *Perkins sect.* 541. *and* 543. *Swin. part* 6. *sect.* 3. *num.* 7. *Cowels Inst. pag.* 139.

267. Note, that the Executor of an Executor cannot sell the land of the first Testator, who by his Testament gave power to his Executor to sell the same, but it shall go to the Heir, unless the Will be otherwise. *Bro. Tit. Executor* 3. *Perkins, sect.* 507, 554. *Swin. part* 6. *sect.* 3. *num.* 11. *in fin.*

268. If a man willeth that his Executors shall jointly sell his Land, or that his Executors and his

his Feoffees shall joyntly sell his Land; in such case, if one Executor sell to one, and the other to another; or if the Executors sell to one, and the Feoffees to another, and afterwards they joyn in sale to a third person, in such case the last sale is only good, and the other void. *Perkins, sect.* 546, 553.

269. If a man willeth his lands shall be sold for the paiment of his debts, and expresseth not by whom it shall be sold, then the Executors shall sell it: but if he willeth his Land to be sold, and expresseth not by whom, nor for what; in such case it hath been held that such Devise is void, and the Land shall not be sold, but descend to the Heir. *Perkins, sect.* 547. 15 *H.* 7. 12.

270. The Executors or Administrators of Tenants in Fee-simple, Fee-Tayl, and Tenants for term of life, of Rent-services, Rent-charges, Rent-secks, and Fee-farms, by the *Stat.* of 32 *H.* 8. may either distrain

aid

ain or have an Action of Debt
gainſt ſuch Tenant as is behind,
nd in Arrear to the Teſtator at
he ſame time of his death, for
uch Arrearages of Rent as ought
o have been paid to the Teſtator in
is life-time; and if the Tenant
who was in Arrear be dead, then
hey may have an Action of Debt
gainſt his Executors or Admini-
rators for ſuch Arrearages. The
Husband alſo who is ſeized in right
f his Wife of any Eſtate in Fee-
mple, Fee-tail, Fee-farm, where
ny ſuch Rents are behind in the
Wives life (whether it be before
r after Marriage) and unpaid at
he time of her death, may have
he like remedy; and ſo may his ex-
cutors or adminiſtrarors. *Co. on Lit.*
.351. b. 32 H. 8. c. 37. Swi. part 6. ſc. 3.
m. 8. Paſc. 23 Elix. Dyer fol. 375.

271. Actions of Account were
iven to Executors by the *Stat.* of
Weſtmin. 2. and Actions of Treſ-
as done to their Teſtator, as for

for his goods and Chattels carried away, were given by the 4 E. 3. 7. and by the 25 E. 3. Executors of Executors have Actions of Debt, Account, and of goods carried away of the first Testators, and Execution of Statute-Merchants and Recognizances made to him, and are also liable to the Actions of those to whom the first Testator was indebted, so far as the goods of the first Testator will extend; but the Goods which did belong to the first Testator shall not be put in Execution for the Debt of the second Testator. *Wingate Abr. Stat. Tit. Executors. Co. 2 part Inst. fol. 494. Finch pag. 173. Noyer Max. pag. 102. Westm. 2. c. 23. 25 E. 3. 65. 4 E. 3. c. 7. Swin. part 6. sect. 3. Plo. Com. fol. 286, 287.*

272. Note, that one Executor cannot sue another for the possession of the Testators goods; for the possession of one is as the possession

of

of both, and therefore one of them hath no remedy against the other but in Chancery, unless there be a Legacy left unto one of them in particular, and then he may sue for that. *Swin. part* 4. *sect.* 20. *num.* 14. *Bro. Exec.* 98. 104. *F. N. B. Exec.* 32. *Ple. Co. fol.* 343. *Swin. part* 6. *sect.* 3. *num.* 20. *Tothils Rep. pag.* 8.

273. If an Infant be made Executor, Administration *durante minoritate* may be committed to the Mother or other friend of the Infant, which shall cease and be void when the Infant comes to the age of seventeen years. 41, 42 *El. C. B. Princes Case, Co.* 5. *lib. fol.* 29. *Nuys Max. pag.* 105.

274. But this Administrator during such Minority, cannot sell or Alienate any of the Goods of the deceased, unless it be upon necessity; as for the payment of the deceaseds Debts, or that the Goods would otherwise perish, for he

hath his Office of Administrator *Pro bono & commodo Infantis*, and not for his prejudice; and cannot pay Legacies, unless there be Assets to pay debts; neither can he let a Lease for a longer time then whilst the Executor shall be under age. *Noys Max. p.* 106. *Ca.* 5. *l. Rep. fol.* 29.

275. If a man make two Executors, one of seventeen years of age, and the other under; in this Case Administration during the Minority of the other is void, because he of seventeen years of age may execute the Will; and therefore if such Administrator should bring any Action, the Executor of seventeen years of age may well release the Debt. *Piggot and Glascoignes Ca. Brownl. 1 part Rep. fol.* 46.

276. And if a woman under the age of seventeen years be made Executrix, and the Administration is committed *durante minoris ætate*, and then she takes an Husband

band of full age; in such case the Administration shall cease. *Co. 5. lib. Rep. fol. 29.*

277. An Infant-Executor upon payment or satisfaction to him of any of the Testators debts, may give a discharge for the same; and it is a good bar against him afterwards: but if he should give a release without payment or satisfaction; in such case he is not barred from the recovery thereof afterwards by such release. *28 El. B.R. Russels case. fo. 5. lib. fol. 27. Tr. 13 Car. 1. B.R. Knivertons and Lathams case. Cro. 3 part Rep. fol. 352, 353. Noys Max. pag. 106.*

278. If a woman during the Coverture be named Executrix, she alone can neither sue nor be sued without her Husband; but she alone may do any extrajudicial Act, as the paying of Debts or Legacies, or the receiving or releasing of any Debts due to the Testator; and so may her Husband alone

without her, though she alone be Executrix; which acts of his shall not only binde her during Marriage, but after also, if she outlive him. *Co. 5 lib. fol. 27. F.N.B. Exec. 23. 30. Bro. eod. tit. num. 147, 151, 152, 178. Kellowayes Rep. fol. 127. num. 74. Swin. part 5. sect. 1. part 6. sect. 3. num. 17.*

279. An Executor may release an Action before Probat, although that before Probat of the Will he may not have an Action; but if he release, and after take Administration, that shall not bar him; for the right of Action was not in him at the time of the Release, as it was in the executor. *1 Jac. C.B. Middletons case. Co. 5. lib. fol. 28. Perkins, sect. 482. Tr. 7 H. 4. Glan. l. 7. c. 7. Fleta, lib. 2. cap. 27. Co. on Litt. fol. 292, b. 18 H. 6. 23. Hernes Law of Con. pag. 86. Cowels Inst. pag. 119.*

280. If an Executor take in the Testators Bond from one of the

Credi-

Creditors, and gives his own Bond for the money; or, if the Testators Creditor be indebted to the Executor in so much as the Testator was indebted, and the Executor releases to him; in both these Cases it is a good Administration by the Executor, and they shall not be charged as assets in his hands, although in the first Case he get a longer day of payment. *Pasch.* 30. *Eliz.* C. B. *Stampe and Hutchings case. Leonards Rep.* 111, 112. *See Brett and Goddards case. Hob. Rep. fol.* 250. *And Arlush and Collisons case. Claytons Rep. p.* 88. *pla.* 148.

281. But if the Executor plead fully administred, and give in evidence Bonds cancelled and taken in, or Acquittances for Money; this will not serve, unless there be proof of real paiments, made upon such Bonds and Acquittances, or of new security given. *Lent-Assize,* 24 *Car.* 1. *apud Ebor. Scotts case.*

Claytons Rep. p. 112. *pl.* 193.

282. If there be divers Executors, and they are all sued, and one of them only pleads, yet Judgment shall be against them all, but the costs shall be against him which pleads, if the other do confess or suffer judgement to go by default. *Brownlo. 2 part pag.* 274. 17 *E.* 3, 45. *b. And see Tr.* 10. *Jac.* 6. *Banc. Lawry and Aldreds case, Brownlow. 2 part Rep. fol.* 183, 184, 185, 186, 187.

283. If an Executor be sued by one of the Testators Creditors, and he plead fully Administred, and the Jury finds Assets in his hands, though they be but to a small value, yet he shall be condemned in the whole debt because of his false plea. *M.* 4. *Jac. B. R. Mary Shipleys case. Co.* 8. *l. fol.* 134. *Clerk of the Assize, pag.* 65.

284. If the Executor promise to pay a Debt of the Testators, this shall binde him, though he have

not

not assets. *Summer-Assize 16 Car. 1. apud Ebor. Smiths case, Clayions Rep. p. 85. pl. 141.*

285. An Executor is not chargeable with a collateral promise made by the Testator, unless there were a breach of it in the Testators life-time. *M. 1649. Christopher and Howes case. Styles Rep. fol. 151. And Pasch. 1650. B. R. Styles Regist. Practicale, p. 121.*

286. If the Creditor make his Debtor his Executor, in this Case the Debtor proving the Will, the Debt is thereby extinguished: or, if the Creditor make his Debtor and another Executors, here though the Debtor die before he Administer as Executor, the other Executor who was not indebted surviving; yet in this Case the surviving Executor shall not have an Action for the same debt against the Executor of his co-Executor; for that the Action was extinguished

by constituting him Executor; and *Actio semel extincta, nunquam revivisc it. Quare.* Bro. *Testam.* 118. *Plo. com. fol.* 184. *Cowels Inst. pag.* 207. *But see M.* 31 *Eliz. in* B. R. *Crosman and Reads case to the contrary, Leonards Rep. fol.* 320.

287. Also if two be bound in a Bond to one in a certain sum of money, and the Obligee makes one of the Obligors his Executor; this is said to be a Release in Law of the Bond and Debt: for the Action is suspended, and a personal Action once suspended is thereby extinct. *Hil.* 11. *Jac.* C. B. *Fryer and Gildridge ca. Hdb. Rep. fol.* 10.

288. If a Debtor makes his Creditor and another Executors, the Creditor if he not prove the Will nor administer, may have an Action against him that doth prove the Will for his debt; and then afterwards he may Administer and take the Executorship upon him when

when he pleases: but if he take it upon him before he sue for his debt, his Action will be thereby extinguished.

289. If the Executor by the Will be to pay money, and no place is appointed, the parties in this case to whom it is to be paid, must make Request to the Executor to pay it, for the Executor in such case is not bound to seek the parties all over *England*, as it is in the case of a Bond where no place of payment is appointed. *Brownl. 1 part Rep. fol.* 46.

290. If one be bound in an Obligation with condition to pay twenty pounds to such person as the Obligee shall name and appoint by his last Will and Testament, and the Obligee afterwards makes his Will, and nominates none to whom the twenty pounds shall be paid; in this case the Executor named in the Testament, may sue and recover the money. *M.* 11.

Iac. C. B. Rott. 945. Pease and Salman against Mead. Brownlo. 1 part Rep. fol. 77.

291. As to the payment of debts by the Executor, he must have a care to pay them according to these following rules, otherwise it may be he shall be forced to pay some of the Testators debts out of his own proper goods, if there be not sufficient goods of the Testators to pay all the debts, therefore observe what follows.

292. First Funeral-expences, Debts to the Kings Majesty, then Judgments must be paid; after them Statutes-Merchant and Recognizances, then Obligations; and if there be divers Obligations, he may pay which of them he pleases first; unless the day of payment in one Obligation be past, and the day of paiment in the other Obligation not come; for then that is to be paid first where the day of paiment is past; or unless one Obligation

gation be put in suit, and the other not, for then that in suit must be first paid: and if there be two Obligations put in suit by two Creditors against the Executor, then he which first gets Judgment must first be paid; and in this case the Executor, if he will, may suffer Judgment in that which was last put in suit, and so pay him off first: then after these Obligations, simple Bills are to be paid; then Rents in arrear by the Testator; then Servants and Head-Workmens Wages; then Merchants Books; and lastly, Contracts by word, in which the Testator could not wage his Law, upon which the Executor may be sued in an Action upon the Case, upon the promise of the Testator. *Bro. Exec. 17. Dr. and Stud. l. 2. c. 10. Dyer fol. 32. Mag. Charta c. 18. Co. 2 part Inst. fol. 32. Cowels Inst. page 150, 151. Herns Law con. pag. 87. Noyes Maximes pag. 104. Co. 3 part Inst. fol. 202.*

202. *Swin. part 6. sect. 16. See M.* 32. *El. C. B. Pemberton and Rashams case, and* 43. *El.* B. R. *Bearblock and Reads case, vouched in the Sadlers case, Co.* 4. *lib. and Harrisons case,* 40 *El. C. B.* Co. 5 *lib. fol.* 28. *Terms of the Law, ver. Executor.* Bro. *Exer.* 33, 87, 127, 163. *Mich.* 9. Jac. C. B. *Puncheon and Legates case.* Brown. 2 *part Rep. fol.* 137. *and Co.* 9. *lib. fol.* 86. *the same case. M.* 42, 43. *El.* B. R. *Littleton and Hebbens case,* Cro, 1 *part Rep. fol.*

293. The Executor is not chargeable for a Trespass done by the Testator, nor for his receit for rents, nor for occupation of lands, as Bayliff or Guardian in Soccage; for this is no duty certain. *Noys Max. p.* 103.

294. If Executors or Administrators have not Assets in their hands to pay all the Creditors, according to these former Rules; then they must pay in order as far as the Goods and Chattels of the Testator

Testator will extend, and the rest are without remedy: but if they pay Debts to others before Debts to the King, or Bonds before Judgments, or Shop-Books before Bonds, &c. then they must pay the same over again, if there be not sufficient left to pay them who ought to have been paid according to the same order, and were omitted. *Hern. Law Com. p. 87.* 295. If the Testator were indebted to the Executor, he may allow his own Debt before he pay other Creditors, to whom the Testator was indebted in the like manner as he was to the Executor, be it by Statute, Bond or otherwise: in case he have made an Inventary, and that he be not executor of his own wrong; for every Creditor by such means, when the Goods be not sufficient to pay all, would strive to make himself Executor of his own wrong, to satisfie himself, and bar others: an Administrator also may

stop

ſtop his own debt. *Plo. com. in Woodward and Darcyes caſe. M. 40. El. B. R. Coulters caſe. Co. 5. lib. fol. 30. Ma. 6. Iac. C. B. Alexander and Lambs caſe. Brownl. 1. part Rep. fol. 103. Swin. part 6. ſect. 16. Plo. com. fol. 184.*

296. If the Teſtator be indebted to one in forty pounds, and the Executor pays but twenty pounds, and gets an Acquittance for the whole forty pounds; yet this Acquittance ſhall not prejudice any other Creditor but for twenty pounds only; and the other twenty pounds ſhall be aſſets in the Executors hands ſtill. *8. Iac. C. B. Turners caſe, Co. 8. lib. fol. 132. Bro. Exec. 6. Swin. part 6. ſect. 16.*

297. If a man deviſe his lands for three years to his Executors for the paiment of his debts, this ſhall be aſſets in the Executors hands: but if a man deviſe his lands to be ſold for the paiment of

his

his debts, it is no assets till it be sold, unless he express it to be so in his Will. *Pasch. 9 Iac. C. B. Brownl. 1 part Rep. fol. 34. Hil. 10. Iac. C. B. Brownl. 2 part fol. 47.*

298. If a man make a Lease for years of a House, &c. reserving Rent, and the Executors after the Testators death receives the Rent, yet it is no assets in their hands, for the whole Rent belongs to the Heir. *20 El. Dyer, fol. 362. Plo. com. fol. 114. and 259.*

299. If an Executor or Administrator make gain of the Testators money, that gain shall be assets in his hand. *Brownlows 1 part Rep. fol. 77.*

300. If an Executor Pay Funeral-expences, or debts of the Testators with his own money, he may retain goods of the Testators to the same value, and they shall not charge him as assets in his hands. *Cleydon and Spencers case, Mores Rep. fol. pl. 3. Hernes Law Con. pag. 88. Noyes Max.*

pag. 104. *Swin. part.* 6. *sect.* 16. *Dyer, fol.* 2 *and fol.* 187.

301. Note, where it is said before *pl.* 284. that an Action lies against an Executor; upon his promise to pay a debt of the Testators; yet there ought to be a good consideration to ground the *Assumpsit* upon, which must either be an advantage to the Executor, or a damage to the Creditor, (as forbearance till such a time, *&c.*) or else the Action will not hold. *M.* 2 *Jac. B. R. Fisher and Richardsons case, Cr.* 2 *part Rep. fol.* 47. *&* *P.* 10 *Iac. B. L. Booth and Cromptons case. Cro.* 2 *part fol.* 613. *and H.* 16. *Iac.* Bogge *and Melins case. Huttons Rep. fol.* 27.

302. If Iudgment be given against Executors, and upon a *Fieri facias* the Sheriff returns *Nulla bona*; in such case the Plaintiff may have another special Writ of *Fieri facias* directed to the Sheriff, that he levy the Debt of the Testators

goods,

goods, and if it appear to him that the Executors have wasted the goods; then that he levy the same of the Executors own proper goods. *H.* 45 *El.* B. R. *Pettifers case*, Co. 5. *lib. Rep. fol.* 32. *and Tr.* 16. *Car.* 1. B. R. *King and Hiltons case.* Cr. 1 *part Rep. fol.* 438.

303. A man was bound in an Obligation with condition for the performance of Covenants, and dies; after whose death his Executors break Covenants, and the Bond being sued, it was moved that Execution might be of the Executors own goods, because the breach of the Condition was the Executors own Act. But the Court denied it, and Judgment was entred *de bonis Testatoris. Tr.* 17 *Iac.* C. B. *Rott.* 1849. *Castilion and Exec. of Smiths case. Hobarts Rep. fol.* 283.

304. If an Executor or Administrator be sued for a Debt of the Te-

Testators, and he knoweth of a Judgment, or other debt upon Record against the Testator; if the Executor have no more goods then will satisfie the same, then he may well plead this special matter, and it shall bar the party that sues, for it shall be taken for a *plene Administravit*: and if the Executor should pay the party that sues before the Judgment, it will be a *Devastavit*, and he will be forced then to pay the Judgment out of his own proper goods, as is shewed before, fol. 292. *Hil.* 7. *Ed.* 6. *Dyer fol.* 79. *P.* 12 *Iac.* B. *Moon and Andrews case, Hobart Rep. fol.* 133. *Tr.* 15 *Iac. C. B. Rot.* 2119. *Kydd and Chyneleys ca. Hob.* Rep. *fol.* 218. *Scarles ca. in Mores Rep. p.* 191. *pl.* 877. *and Barracloughs c. Clayt.* Rep. 65. *pl.* 112.

305. If an Executor be not minded to take upon him the Office of Executor, then it behoves him not to meddle with any of the Testators Goods, for if he once Administer

ster of the Goods of the deceased, and make use of them by selling the goods, or killing any of the Cattel; or, if he pay any of the Testators debts, or receive any debts due to the Testator, and give Acquittances for the same, with other like acts; in such Case he shall be said to Administer as Executor, and may be compelled to stand to the Executorship. *Hil. 8 Jac. C. B. in Wickenden and Thomas case, Brownlows 2 part Rep. fol. 58. Bro. Ex. 49. Fitz. Exec. 38. Stokes and Porters case, Mores Rep. fol. Roys Max. p. 102. Tr. 13 Eliz. C. B. Hawkins and Laws case, Leon. Rep. fo. 135. Swin. part 6. sect. 22. Porters case. Dyer, fol. 166.*

306. If a Stranger who is neither Executor nor Administrator enter upon the Goods, as aforesaid, this shall charge him as Executor of his own wrong, and he may be sued by the Creditors of the person deceased:

but

but after the Will is proved, nor Administration granted, and they have intermedled with the Goods, then the Stranger cannot be sued, because there is another Executor of right, against whom the Creditor may bring his Action, and is chargeable as far as those Goods will extend, which are come to his hands after he hath assumed upon him the charge of the Executorship: but notwithstanding all this, that there be an Executor which doth Administer, yet if the Stranger will still take the Goods, and claim to be Executor, and pay debts or legacies, or recive debts, in such case it is said he may be charged as Executor in his own wrong, although there be another Executor of right. *Quia os sum contra se aperuit; nam expressa nocent, quæ tacita non nocent.* 2 *Iac. C. B. Reads case. Co.* 5. *l. fol.* 33, 34. *Swin. part* 6. *sect.* 22. *M.* 3 *Car.* 1. *Whitmore and Porters*

ters case. Cro. 1 part Rep. fol. Vide 11 & 12 Iac. C. B. Rolt. 4087. Keeble and Oshastons case. Hobarts Rep. fol. 49. And Chandler and Thompsons case 1621. Bro. 2 part Rep. fol. 185.

307. Note, that an Executor of his own wrong is chargeable no further then the value of the Goods which come to his hands, and with which he hath intermedled. *Brownlows 2 part Rep. fol. 185. Mich. 13 Car. 1, B. R. Styles Repracticale, page 120.*

308. If a man do onely perform deeds of charity, as to feed the cattel of the deceased, lest they should perish, or take into his custody the Goods lest they should be stoln, or dispose of the Goods about the Funeral of the Testator, these acts do not charge a man as Executor of his own wrong. *Franc. Mantica de conject. vlt. volunt. l. 12. tit. 9. num 18. Fitz. Exec. num. 38, 45. Bro. Admin. num. 6, 28. Swin. part 6.*

sect.

sect. 22. *Brownlows Rep. 2. part. fol.* 184. *Hil. 1 El. C. B. Dyer, fol.* 166. *Noyes Max. pag.* 102.

309. Where servants after the death of their Lords or Masters do imbezil their Goods, after full information thereof made to the Lord Chancellor by the Executors, or two of them, of such spoil made, the said Lord Chancellor by advice of the two Chief Justices, and Chief Baron, or two of them, shall have power to make such Writs to be directed to such Sheriffs as to them shall seem fit, to make Proclamation in such places within twelve days after the delivery of the said Writs, as to the said Chancellor by advice aforesaid shall seem reasonable, that the Offender appears in the Kings Bench at the day limited in the Writ, which Proclamation shall be made fifteen days before the day of appearance, when if the Offender appear not, he shall be attainted of

Fe-

felony; and if he appear, the Iuſtices ſhall commit him to priſon, there to remain until he have anſwered the Executors in their Actions, and the ſame Actions be determined; provided that they be purſued with effect, and not ſlackly: but if the Offenders procure two ſufficient men to be bound with them in Recognizance to the Executors in the ſame Court where they ſtand committed, to keep ſuch day as they ſhall have by the Court, then the Iuſtices there may bail them; and if the Goaler let them go at liberty without the Iuſtices Order, he forfeits fourty pounds. *Stat. 33 H. 6. cap. 1. Wingates Abr. Stat. tit. Executors.*

310. If any perſon ſhall obtain any Goods or Debts of an Inteſtate, or Releaſes or other diſcharge of any Debt or Duty, (which belonged to the Inteſtate) by fraud, (as by procuring the Adminiſtration to be granted to a Stranger

ger of mean estate, and not to be found, with Intent thereby to obtain the Intestates estate) and not upon valuable consideration, or in satisfaction of some just debt, answerable to the value of the Goods so obtained; in such Case such person shall be chargeable as Executor of his own wrong, so far as the value of the Goods or Debts so obtained shall amount unto: howbeit, he shall also be allowed such reasonable deductions, as other Executors or Administrators ought to have. 42 *El. cap.* 8. *Winga. Abbet. Stat. tit. Executors.*

311. Note, that the time wherein he that is named Executor in the Testament is to deliberate and determine whether he will accept or refuse the Executorship, is left to the discretion of the Ordinary, who not only within the year (allowed by the Civil Law) but within a month or two may cite him to accept or refuse the Office. *Swin.*

part 6. sect. 4. Refer. Legum Eccles. tituli Testamentis, cap. 34. pag. 143.

CHAP. X.

of making of an Inventary, proving of the Will, with the Fees thereof, and before whom it ought to be proved, and of passing an Account, and paying of Mortuaries.

312. WHen an Executor intends to accept of the Office, it behooves him to make an Inventary of the Testators Goods; for if he meddle with the Goods, and refuse to make an Inventary, he may be punished by the Ordinary; but he may meddle with the Goods as to the discharging of Funerals, or disposing of such things as cannot be preserved and kept till the time of making the Inventary. *Swin. part 6. sect. 6 and 8. 21 H. 8. cap. 5.*

313. And as for the time of making the Inventary, it is left to the discretion of the Ordinary, who may appoint a longer or shorter time, according as the distance of the place where the Goods remain, or other circumstances shall minister occasion. *Lyndw. in C. Stat verb. Arbitrio, Swin. part 6. sect. 8 num. 1.*

314. And as for the form thereof, it ought to be made by two at the least, to whom the Intestate was indebted, or left any legacie; and upon their refusal or absence, two or more other honest men may by the Executors appointment make the Inventary of all the Goods and Chatrels, Rights, Wares and Merchandises, as well moveable as not moveable whatsoever, that were of the person deceased; and the same must be Indented, whereof one part is to remain with the Executor, and the other with the Ordinary, where the

the Executor must swear that the same is true: and the usual course in making of such Inventaries, is first to set down moveable Goods, beginning with his Purse and Apparel; then Houshold-stuff as it stands in every Room, beginning in the Hall, and so from room to room in order throughout the House, then Corn in the Barnes or Garners, or ready sown in the Fields; then Cattel, Husband-geer, as Ploughs, Carts, &c. the immoveable Goods, as Leases of Lands or Tenements; and after that, the Debts due to the Testator; and oftentimes at the lower end of all, the Debts owing by the Testator to other persons. 21 H. 8. c. 5. *Franc. Porcel. Trac. de Invt. Swin. part 6. sect. 9. Refor. Legum Eccles. c. de Testamentis, sect. 20.*

3. 5. Note, that the Goods in the Inventary ought to be particularly prized and valued according to reasonable prizes, and not

hudled up together several things in a gross sum: but those Goods which do belong to the Heir after the Testators death, must not be put into the Inventary; neither may those Goods called *Bona Paraphernalia*, (which is the Wives convenient Apparel agreeable to her Quality) be put into the Inventary: nay, such is the general custom within the Province of *York*, that Widows are there not only tolerated to reserve to their own use their convenient Apparel, and a convenient Bed and Furniture; but also a Coffer or Box with divers things therein, as Jewels, Chains, Borders, and other things necessary for their own persons. *Swin. part. 6. sect. 9. num. 5. Johannes Garsi. Tract. de expensis, fol. 182. Perkins, sect. 526. Noyes Max. pag. 107. Swin. part 6. sect. 7.*

316. Certain Jewels to the value of 500 Marks, were allowed to a Viscountess, as her *Peraphernalia*,

wife, and accounted but a reasonable allowance for one of her degree. *Viscountess Bindons case. Abr. Moors Rep. pag.* 72. *pl.* 338.

217. But note, if the rest of the Goods will not suffice to pay the Husbands Debts, then are the Wives Jewels, Chains, Borders, and such like (being things of Decency or Ornament, and not of Necessity) to be put into the Inventary amongst other Goods of the deceased, towards the paiment of the Debts. *Swin. part* 6. *sect.* 7. *num.* 5. *in fin.*

218. Note also, that the Husband may Devise such Chains and Jewels, &c. though he leave sufficient Assets besides to pay his Debts, and in such case the Wife shall not have them as her *Paraphernalia*: but if the Husband make no Gift or Devise of them, and leave Assets besides to pay his debts, then the Wife in such case may keep them in despite of the Execu-

huddled up together several things in a gross sum: but those Goods which do belong to the Heir after the Testators death, must not be put into the Inventary; neither may those Goods called *Bona Paraphernalia*, (which is the Wives convenient Apparel agreeable to her Quality) be put into the Inventary: nay, such is the general custom within the Province of *York*, that Widows are there not only tolerated to reserve to their own use their convenient Apparel, and a convenient Bed and Furniture; but also a Coffer or Box with divers things therein, as Jewels, Chains, Borders, and other things necessary for their own persons. *Swin. part. 6. sect. 9. num. 5. Johannes Garsi. Tract. de expensis, fol. 182. Perkins, sect. 526. Noys Max. pag. 107. Swin. part 6. sect. 7.*

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317. But note, if the rest of the Goods will not suffice to pay the Husbands Debts, then are the Wives Jewels, Chains, Borders, and such like (being things of Decency or Ornament, and not of Necessity) to be put into the Inventory amongst other Goods of the deceased, towards the paiment of his Debts. *Swin. part 6. sect. 7. num. 5. in fin.*

318. Note also, that the Husband may Devise such Chains and Jewels, &c. though he leave sufficient Assets besides to pay his Debts; and in such case the Wife shall not have them as her *Paraphernalia*: but if the Husband make no Gift or Devise of them, and leave Assets besides to pay his debts, then the Wife in such case may keep them in despite of the Execu-

tors or Administrators. *Tr. 8 Car. 1. B. R. Lord Hastings, and Sir Archibald Douglas case, Cro. 1 part Rep. fol. 251, 252, 253. And see Davenports case, 5 Car. 1. in Chancery. Compl. Atter. p. 305.*

319. If any Creditor or Legatary do affirm that more Goods came to the Executors hands, then are named in the Inventary, he must prove it; for otherwise Credit is to be given to the Inventary. *Maschard. de Probat. Conclusio 939. Swin. part 6. sect. 10. Reforma. Legum Ecclesiast. tit. de Testamentis, c. 21.*

320. If there be several Executors, and one of them exhibits an Inventary, this shall not charge the other in an Action brought against them; but the party that sues must prove that such Executor hath actually Administred, and that Goods came to his hands, or else he shall not be charged. *Lent Assizes apud Ebor. 8 Car. 1. Irelands case. Claytons Rep. pag. 106. pl. 179.*

321. After an Inventary made, as afore declared, then the Executor is to prove the Testament before the Ordinary, or other Judge to whom the Probat thereof belongs; and if the same be not in the Executors possession, but in some others hand, then he may cite such person before the Ordinary, and force him to exhibit the same. *Perkins, sect.* 486. *Swin. part* 6. *sect.* 12.

322. Note, that all Testaments ought to be proved before the Ordinary, except in spiritual places, where the Lords have the Probat of their Tenants Testaments before their Stewards or themselves in their Temporal Courts. *Perkins, sect.* 486.

323. If a Lord would have the Probat of a Testament made within the precinct of his Manor, he cannot prove a Testament made without the said precinct. 12 *Rich.* 2. *Testament.*

4. 11 H. 7. fol. 12. Co. 2 Lect. Inst. fol. 231.

324. A Testament proved before the Commissary of the Bishop, or before any Officer of the Ordinary deputed to the same, is sufficient; or if it be before the Sequestrators of the Arch-Deacon of such a place, and his Seal put thereunto, it is sufficient; for all Testaments cannot be proved before the Ordinary himself; and properly the Probat of the Will doth belong unto him to whom the Sequestration doth belong. *3 E. 3. Testament. 5. 1 Hen. 6. 1. 11 H. 4. 64. Perkins sect. 490, 491. Tr. 7 E. 4. fol. 14. a.*

325. A Testament after it is proved, is of so great force, that a man shall have no direct Traverse against it, because it being to be tried by the Certificate of the Ordinary, it is supposed that he will not certifie contrary to that which is shewed unto the Court under his

his Seal: but if a man be sued by an Executor after Probat, though he can have no Traverse to the Testament, yet he may say that the Testator made not the Plaintiff Executor. 18 E. 2. *Testamen.* 6. *Perkins sect.* 493.

326. Note, that the proving of the Testament is done two manner of ways; either by common form, or form of Law: the common form is, when the Executor after the Testators death presents the Testament to the Judge, and produceth Witnesses to prove the same *viva voce*, without citing or calling such as have interest therein; and thereupon the Judge doth annex his Seal to the Testament. 21 *H.* 8. *c.* 5. *de Castr. Consil.* 99. *vol.* 1. *Swin. part.* 6. *sect.* 14.

327. When it is proved in form of Law, then the Widow or next of Kin to the deceased, to whom Administration should belong if the party had died Intestate, are

cited to be present, and the Wills exhibited, and the Witnesses examined privately every one of them, as well to the Articles exhibited on the Executors part, as to the Interrogatories administred on the Widow, or other adverse parties behalf; and so according to the sufficiency of the proof, the Judge doth pronounce either for the validity of the Testament, or against it, according to his discretion. *Paul. de Castr. Con. 96. vol. 1. Smin. part 6. sect. 14. num. 3.*

328. When a Testament is proved after the common form, the parties interested may force the Executor to prove it over again in due form of Law, which may endanger the Testament if the Witnesses be dead in the mean time; unless it be after ten years space, for then it shall be presumed, that necessary solemnities have been observed: but on the contrary, if it be once proved in form of Law, the

Executor is not compellable to prove the same any more. *Socin. Jun. Consil. 89. vol. 1. Swin. part 6. sect. 14. Paul. de Castr. Consil. 96. vol. 1. And. Simon. de Prat. Interp. ult. Volum. l. 2. Dub. 2. Soluc. 3. sect. 207. num. 4. and 5.*

329. Note, when any one intends to plead any thing against the validity of a Testament, they ought to do it at the time of the proving it, or within a year after, unless they were at such time Infants, or in Travel beyond the seas, so as they could hear nothing of it; and then they shall have six months after their return from Travel to plead against it, and the Minors a year after they come to full age: and if such parties exceed their limited times, then they are excluded from any remedy, unless it be in case where the Testament was not at first proved in form of Law, but after the common form; for then they may cause the Testa-

ment

ment to be proved over again at any time within ten years, and alledge what they can against it. *Refor. Leg. Eccles. tit. de Testamentis, cap. 6.*

330. If any shall exhibit a false Testament, or any ways pervert a true Testament, by adding, diminishing, changing, or interlining the same, and is openly convinced of such crime, they shall thereby be excluded from all benefit accrewing to them by such Testament. *Refor. Legum Eccles. tit. de Testamentis, cap. 39.*

331. If an Executor or Administrator, be ancient, sickly, or live far distant from the Court, where he should have the Probat of the Will, or Letters of Administration, then he may in such case have a Commission directed to two Neighbor-Ministers to take his Oath, and upon return thereof have the Probat under Seal.

332. As touching the Fees

taken

taken for Probat of Wills, &c. they vary according to the custom of several Places; but where the Inventary exceeds forty pounds, the usual Fees are between five Nobles and fourty shillings, if it be by Commission; and if it be not by Commission, but that the Executor go himself to the Ordinary, or other Ecclesiastical Judge, who hath the granting of the same, then it will not cost so much by 13 s. 4 d. or thereabouts.

333. But if these Officers could be brought to walk by the Rules of the Statute, the Fees would be far less; for by the Stat. of the 21 H. 8. cap. 5. it is enacted, That if the goods of the Testator do not exceed five pounds, that then there is only due to the Scribe for writing the Probat of the Testament, six pence, but nothing to the Ordinary or his Official, &c. for the Probat thereof and putting to his Seal: but then the Testament must

be

be exhibited to him in writing, with wax thereunto affixed ready to be sealed and proved *Communi forma*, and in such case he is to dispatch the party without delay; and no more is due then six pence for granting Administration, where the Intestates goods do not exceed five pounds, as aforesaid. *Wingates Abr. Stat. tit. Prob. of Testam. num.* 2. 21 *H.* 8. *c.* 5. *Swin. part* 6. *sect.* 15.

334. When the goods of the deceased exceeds five pounds, and are under fourty pounds; then there is due to the Ordinary for the Probat two shillings and six pence, and to the Scribe for Registring the same one shilling; and where the goods exceed fourty pounds, then there is due to the Ordinary for the Probat two shillings and six pence, as aforesaid; and two shillings and six pence to the Scribe for Registring of the same; or the Register may refuse

two

two shillings and six pence, and take a penny for every ten lines of the Testament, each line being to contain ten inches in the length: but note, that in all these cases the Will must be brought to the Ordinary ready ingrossed with wax at the same, if you intend to tie him to the Fees abovesaid. *Smin. part 6. sect. 15. Refor. Legum Eccles. tit. de Test. c. 17. Wingates Abr. Stat. tit. Prob. of Testaments, num. 3. 21 H. 8. c. 5.*

335. The Fees either for the Copy of the Will or Inventary are the same as are allowed for registring of the Will, or the Register may refuse the same, and take a penny for every ten lines for the length as aforesaid. The Officer that takes more then his just Fee, shall forfeit that excess to the party grieved, and ten pounds besides, to be divided betwixt the King and the party that will sue for the same in any of the Kings Courts.

336.

536. Where by custom less hath been taken in any of the cases aforesaid, there less is to be taken still, notwithstanding the Act of the 21 H. 8. *Wingates Abr. Stat. Of Probat. of Test. num. 1. Sum. part. 6, sect. 15. num. 4. 21 H. 8. cap. 5.*

537. If a Testament be in Paper, and the Executor desires that the same shall be transcribed and ingrossed in Parchment, then he must agree with the Clerk for transcribing the same as cheap as he can; and when both are brought to the Ordinary, it is in his choice whether he will put his Seal and Probat to the Original or Transcript: but there is nothing due to the Ordinary for the Transcript, nor for examining the same with the Original; but onely for affixing his Seal and Probat, he shall take such Fees as is afore declared. *Co. 3 part. Inst. fol. 149, 150. Chap. Extraction.*

538. And if any Ordinary or his Of-

Official, &c. exact greater Fees then these above-mentioned, it is Extortion, and so it was adjudged by the whole Court of Common Bench, *Mich.* 6 *Jac.* upon an Information against one *Rowse* Commissary of the Arch-Deacon of *Huntington*, at the suit of one *Neal*, which was for taking a Fee for engrossing the Probat upon the Transcript of the Testament, over and above his lawful Fee, due by the 21 *H.* 8. above-mentioned: and if this president were put into practice, the Probat of Testaments and granting Administrations would not be so chargeable as in most places at this day they are. *Mich.* 6 *Jac.* C. B. *Rott.* 1301. *Neal and Rowse case, Co.* 4 *part Inst. fol.* 336.

339. When a Will where Lands are devised comes to be proved in the Prerogative Court, they ought only to take a Copy thereof into their

their Leiger-book, and deliver the Original to the Legatee of the Lands to support his Title by, if he be questioned for the same. *Mich. 1649. B. R. Styles Regist. Practicale Pag. 358.*

340. If a man be long absent, and it be not known whether he be alive or dead, if he have made a Will, it may be proved; especially if it be reported that he is dead, and that the party absent were sickly, and a very old man when he went away, or the like. *Mischard. de Fropac. Conclusio 1074. num. 4. Swin. part. 6. sect. 13.*

341. Note, that if the party dying have at the time of his death goods or good debts in any other Diocess or Diocesses, or peculiar jurisdiction within that Province, besides those goods in the place where he dyes, amounting to the value of five pounds at the least; then the Probat of such Will, or granting Administration, belongs

to

to the Arch-Bishop or Metropolitan of that Province; whether it be within the Province of *Canterbury* or *Yorke*, this does not prejudice those Dioceses where by composition or custom *Bona Notabilia* are rated at a greater sum. *Book of Canons, pub. Fac. Anno Domini* 1603. *Can.* 92. *and* 93. *Perkins, sect.* 488.

3. And if the Executor or Administrator cited or appearing voluntarily before the Judge (appointed for Probat of Wills &c. within such Diocese or peculiar Jurisdiction where the party died) do upon his Oath affirm, that the party deceased had goods or good debts to the value of five pounds aforesaid in any other Diocese or Dioceses, or peculiar Jurisdiction within the said Province; then is the Judge to dismiss him, and admonish him to prove the said Will or require Administ-

miniſtration of the goods in the Prerogative Court of the Arch Biſhop of the Province, and afterwards to exhibit the Probat or Adminiſtration under Seal of the ſaid Prerogative-Court before him the ſaid Judge within fourty days then next following: and the ſaid Judge ſo diſmiſſing the party as aforeſaid ſhall not exact or take any charges of the ſaid parties, more than ſuch only as are due for the Citation, and other Proceſs had and uſed againſt ſuch perſons upon their contumacy; and if any Judge or their Regiſter ſhall offend herein, he is to be ſuſpended from his Office *ipſo facto*, and not to be abſolved till he have paid to the Party all his expences laid out contrary to the tenor of the premiſſes. *Can.* 1 *Jac. An. Dom.* 1603. *Can.* 92 *and* 93. *Swin. part* 6. *ſect.* 11.

343. Note, that the Probat of every Biſhops Teſtament, or granting Adminiſtration of his goods (although

ough he have no Goods but with-
his own Jurisdiction where he
as Bishop) doth belong to the
rch-Bishop within whose Pro-
ince the party deceased was Bi-
hop. *Co. 4 part Inst. fol. 335.*

344. If any Ordinary of a Dio-
ess, or Commissary of a peculiar
urisdiction commit Administrati-
on of his Goods, that hath *Bona
Notabilia* as aforesaid in divers Di-
ocesses, it is utterly void to all in-
tents and purposes, as well concern-
ing goods in his own Diocess as
elsewhere. But if the Metropoli-
tane do commit Administration,
supposing the party deceased to
have *Bona Notabilia*, whereas he
hath but Goods only in one inferi-
our Diocess; this Administration
is not void, but only voidable by
Sentence, for that the Metropoli-
tane hath Jurisdiction over all the
Diocesses within his Province. 22
*Al. B. R. Veer and Jefferies Case,
vouched in Co. 5. lib. fol. 30. in*

Prince s

Princes case, and more Rep. the same case.

345. Note, that in former times (when Popery and Idolatry reigned in this Kingdom) every Executor or Administrator was to pass his Account to the Ordinary, how he had performed his Office and in any thing remained in the Executors hands after the payment of the Testators Debts, then the Ordinary used to appoint the payment of such Residue to pious uses; but this is now of little use; for at this day the Ordinary cannot compel the Executor to make such distribution; for if any thing remain, the Executor or Administrator may keep the same, and convert it to their own use. *Swin. part 6. sect. 20. num. 2.*

246. Upon the passing an Account as aforesaid, it was usual to call the Creditors to whom the Testator was indebted, and also the Legataries, and all others having interest,

interest, before the Ordinary to whom the Probation appertained; and they were to hear the Account; and if it appeared to the Ordinary that the Executor had faithfully executed his Office, and fully Administred, then he might acquit the Executor, and give Letters of discharge from being any further troubled, at least in the Ecclesiastical Court; but if the Account were made in the Creditors absence, and they never called, such Account doth not prejudice them. *Swin. part 6. se. 20. Lindw. in c. Stat. sect. Et postquam verb. Ordinariis.*

347. And if any inferiour Judge under the degree of a Bishop, should grant unto any Executor Letters of Acquittance or final Discharge before a lawful Account made, that is *ipso facto* inspended *ab ingressu Ecclesiæ* by the space of six Months, and the Executor doth receive no benefit by such acquittance, *Lindw. in D. c. in fin. verb.*

Ac-

Acquietantiarum. Swin. part 6. sect. 21. num. 3.

348. As touching Mortuaries, it is enacted by Authority of Parliament, That no Parson, Vicar, Curate, parish-Priest, nor any other spiritual Person, nor their Farmers or Lessees shall demand any Mortuary for any person dying, but in such places only where Mortuaries have been used to be paid and given in those places, according to the rates hereafter mentioned; and that no person pay in more places then one, and that is in the place of their most dwelling or habitation. *21 H. 8. c. 6. Swin. part 6. sect. 16. Wingate Abr. Stat. tit. Mortuaries.*

349. If a Person at the time of his Death be not worth in Moveable Goods to the value of ten Marks, no Mortuary is then due; if he be worth ten Marks or more, clearly above his debts paid, and under thirty pounds or above, and under

under fourty pounds, then a Noble is due; and if he be worth fourty pounds or above, to any sum whatsoever, then ten shillings is due: and if any of the Persons before named take more then is here set down, they forfeit fourty shillings, and so much more as they took more then their due: and in such places where less hath been accustomed to be paid, no person shall be compelled to pay more then according to the custom in such place. *Wingates Abr. Statut. Tit. Mortuaries.* 21 *H.* 8. *c.* 6. *Swinburn part* 6. *sect.* 16.

350. Note, that no Mortuary is to be paid for a woman being Covert-Baron, nor for a Child, nor for any person not keeping house; and if a way-faring man die, his Mortuary is to be paid in such a place where he had the most habitation, if Mortuaries be accustomed to be paid in such place. *Wingates Abr. Stat. Mortuaries.* 21

H.8.c.6. Swin. part 6. sect. 16.

351. The Bishops of *Bangor*, *Landaff*, *St. Davids* and *St. Asaph*; and the Arch-Deacon of *Chester*, may take such Mortuaries of their Priests within their Dioceſſes and Juriſdictions, as heretofore hath been accuſtomed. 21 *H.8.c.6. Swin. part 6. ſect. 16. VVingates Abr. Stat. tit. Mortuaries.*

352. Where Mortuaries are due, they are to be paid out of the deaths part only, and not out of the whole before Diviſion, where the Widow and Children are to have their reaſonable parts; and ſuch Mortuary is to be paid before any other Legacy whatſoever. *Hoſtienſ. in C. conquerente de Offic. Ordin. verb. Mortuar. Swin. part 6. ſect. 16. in fin.*

CHAP.

CHAP. XI.

Of the Power of the Ordinary in granting Administrations, and some few Cases touching Appeals, and also of the Office of an Administrator, and how far the Ordinary is chargeable for the Intestates Debts.

353. ORdinary in the usual and common sense signifieth a Bishop, and is derived *ab ordine*: but generally by the Law *Ordinarius* is not only taken for a Bishop, but every one that is *in loco Episcopi*, as Guardians of the Spiritualities, and such as have peculiar and exempt jurisdiction Ecclesiastical, and be immediate Officers to the Kings Courts of Justice. *Co. on Lit. fol. 344. 1 & El. Dyer fol. 350. Regist. fol. 67. Co. 2 part Inst. fol. 398.*

354. If a Caveat be entred with the Bishop, that he should not admit any without giving notice, yet notwithstanding he may admit

one to the Administration: but if it be one who hath no right that is admitted, he is then a disturber; otherwise the Caveat doth nothing but onely to make the Bishop careful what person he admits. *Brownlowes Rep. 2. part fol. 119.*

355. The Ordinary is to commit Administration of the goods of one dying Intestate to the Widow, or to the next of his blood, if they will accept it, or to both: and where divers are next of blood, and in equality of degree, and do claim Administration; in such case he may grant it to which of them he pleaseth: or, where one claimeth as next of blood to the Intestate, where in truth divers are in equality of Kindred; here the Ordinary shall be at his choice to accept one or more making Request: and where but one or more, and not all are in equality of Kindred, and do make Request, the Ordinary is at liberty to admit the Widow, and him

him or those only making Request, or any one of them, at his pleasure: and if the Ordinary do not observe these Rules, he forfeits ten pounds, by the 21 H. 8. c. 5. Fynch l. 2. c. 16. page 174, 175. Noys Max. pag. 105. Style's Regist. Practicale. p. 22. Mich. 24 Car. 1. B. R. Refor. Leg. Eccl. tit. de Testamentis c. 42.

356. One of the half-blood is in as equal degree of Kindred, to have the Letters of Administration committed to him, as one of the whole blood is. Mich. 23 Car. 1. B. R. Styles Rep. fol. 74, 75. and Pasch. 24. c. 1. B. R. Hill and Brides case. Styles fol. 102.

357. If the Ordinary take any Reward or Fee for preferring of any one person before another to the Administration, it is Bribery, and punishable with Fine and Imprisonment at the Kings pleasure, and frequently loss of their place. 2. 3 part Inst. fol. 148. cap. Brib. in fine.

358. When the Widow or next of Kin cited and refuse the Administration, then the Ordinary may grant it to some of the Creditors, or to some other such as he thinks fit. *Hernes Law of Conveyances. Page 86.*

359. Where divers are made Administrators, they have but one joynt Interest, and therefore one of them cannot discharge a Debt by himself in prejudice of the others, as one Executor may do, as is shewed before in the ninth Chapter; but in such case all the Administrators must joyn. *Hernes Law Convey. pag. 88.*

360. If Administration be unduly granted to such a person as ought not to have the same; in such case the Ordinary may revoke the same afterwards: but if it be duely granted to those who of right ought to have the same, then he cannot lawfully revoke it; and if there be a suit depending to that pur-

purpose in the Spiritual Court, a Prohibition will be granted. *Clarks case, M. 20 Jac. B. R. Rott. 2196. Vide Cro. 1 part, Fotherbies case and Pasch. 21 Car. 1. B. R. Bettesworth and Bettesworths case. Styles Rep. fol. 10.*

361. If Administration be unduly granted by the Ordinary of an inferiour Diocese, the party grieved cannot have a Prohibition at the Common Law, but he must appeal to the Metropolitan or Archbishop of the Province, from thence to the Court of Delegates; for the Stat. of 21 *H.* 8. doth not say that the Administration shall be committed to the next of blood, or else the Administration to be void; but that it shall be granted on such a pain: and so it doth not take away the Cognizance of the Case from the Ecclesiastical Judge. *P. 1 Car. 1. B. R. Mayowes ca. Latches Rep. fo. 67. M. 24. Car. 1. B. R. Browne and Poynes case. Styles Rep. fol. 147.*

362. If one die Intestate, and the Ordinary grants Administration to a Stranger, and the next of Kin sues a Citation out of the Spiritual Court to have the Administration revoked, and pending the Suit the Administrator sells the Goods to defeat the next of kin, and then the Letters of Administration granted to the Stranger are revoked and made Null by Sentence: yet in this case the Sale by the first Administrator is good: but if the next of kin had appealed to have the Administration revoked, and pending the appeal the first Administrator sells his Goods, then in such case the sale is void: and so note the difference between a Suit by Citation to revoke a former Administration, and an appeal; for an appeal doth suspend the former Sentence. 37 *El. B. R. Packmans case. Co. 6. l. fol.* 28. *Vide Harlings case. Claytons Rep.* 25.

363. Where an appeal is made, and

and the first Administration is confirmed, then the use is to send back the Cause to the Court from whence it came by appeal: but when the first sentence is reversed, then the first Court is outed of its Jurisdiction, and the Court which reverses it shall commit the Administration *de novo*. P. 1 Car. 1. B. R. *Reeve and Dennyes case*. Latch. 85.

364. Appeals in Cases Testamentary, Matrimony and Tythes, must be sued from the Arch-Deacon or Official (if the matter be there commenced) to the Bishop of the Diocese; and from the Bishop Diocesan, or his Commissary in such case, (or when the matter is there commenced) within fifteen days after sentence given, to the Arch-bishop of the Province and no farther, but there to be definitively adjudged. See *num.* 368. 24 *H.* 8. *c.* 12. *Wing. Abr. Stat. tit. App. to Rome, nu.* 5. *Co.* 4 *part Inst. f.* 339.

365. When the Cause is commenced before the Archdeacon, or Commissary of the Arch-bishop, the appeal may be made (within fifteen days after sentence given) to the Court of Audience of the said Arch-bishop, and from thence within fifteen days after sentence, then to the Arch-bishop himself, and no further: when the Cause is commenced before the Arch-bishop himself, it was to be determined there without further appeal, by the Stat. 24 H. 8. c. 12. 24 H. 8. c. 12. *VVing. Abr. Stat. tit. Appeals to Rome num. 6 and 7. Ca. 4. part 1 fol. 339*

366. But see the Stat. 25 H. 8. where it is added further, that appeals shall be from the Arch-bishops Courts to the King in his Chancery, where a Commission shall be awarded under the Great Seal to certain persons to be named by the King, for the determination of the said appeals, and from thence no further; and these Commissioners

are

so called Delegates, because they are delegated by the Kings Commission. *Co. 4 part Inst. fol. 339, 340. 25 H. 8. c. 19. Wingates Abr. Stat. 311. Appeal to Rome, num. 4.*

367. When the Cause or Suit concerns the King, the party grieved may (within 15 days after Sentence given) appeal from any of the said Courts Ecclesiastical to the higher Convocation-house of that Province, and no further; and there to be finally determined. *24 H. 8. c. 12. Co. 4 part Inst. fol. 322 and 339. in fine.*

368. Appeals from places exempt which were before to the *See* of *Rome*, shall be into the Chancery *ut supra*, and not to the Arch-bishop; and shall be determined by the Delegates. *25 H. 8. c. 19. Co. 4 part Inst. fol. 340.*

369. But note, that where it is said in the case aforesaid, upon the

Stat. of the 24 and 25 *H.* 8. that the Sentence ſhall be definitive upon certain appeals there mentioned, yet notwithſtanding, the King as Supream Head, upon complaint to him made, may grant a Commiſſion of Review; for ſo the Pope uſed to do as Supream Head, and the ſame power which the Pope had formerly doth now of right belong to the Crown, and is annexed thereunto by the 26 *H.* 8. *c.* 1. *and* 1 *Eliz. c.* 1. And ſo it was reſolved, *Tr.* 59 *El. B. R.* where the caſe was, that ſentence being in an Eccleſiaſtical cauſe in the Countrey, the party grieved appealed to the Arch-Biſhop where the firſt ſentence was affirmed; from thence he appealed to the Delegates, before whom both the former Sentences were repealed, and made void by definitive ſentence: and thereupon the Queen as Supream Head granted a Commiſſion of Review *ad Revidendum* the ſentence of the Dele-

Delegates. *Co. 4 part Inst. fol. 341 Tr. 39. tit. B. R. Hollingworths case. Rastal Rome 389.*

370. If the Ordinary knowing that there is a Testament and an Executor named therein, will notwithstanding grant Administration of the deceaseds Goods, not having first called the Executor before him to prove the Will, or to accept or refuse the Executorship; then in such case, when the Executor shall prove the Will, he may sue the Administrator in an Action of Trespass, notwithstanding the Administration granted by the Ordinary. *Swin. part 6. sect. 2.*

371. If a man be Executor to one, who was Administrator to another man, in this case he shall not have administration of such Goods as his Testator had by virtue of the Administration; but the Administration thereof shall be committed to the next of kin to him that died first. *Vide H. 43*

El.

El. C. B. Thorns case Goldes. Rep. pag. 182. *pl.* 118. *Hornes Law Convey. Pag.* 88. *Fitz. Abr. tit. Admin. num.* 3. *Swin. part* 6. *sect.* 3. *num.* 12.

372. If an Executor in an Action brought by him recovereth, and afterwards dieth Intestate, and then Administration of the Goods of the first Testator is committed to *J. S.* in this case *J. S.* before the *Stat.* of the 17 *Car.* 2. could not sue out Execution upon such Recovery, but was to begin anew; because he comes in paramount to the Executor, and claims immediately from the first Testator: but see now the late Act made at *Oxford* 17 *Car.* 2. for avoiding of unnecessary suits and delays, it stands on continuance for five years, and from thence to the end of the next Session of Parliament. *Co.* 5. *lib. fol.* 9. *in Brudenels case. Cro.* 2 *part. Yare and Goughs case*, 1 *Jac. B. R. and M.* 4. *Car.* 1. *B. R. Snape and Norgates case. Cro.*

Cro. 3 part, and Mores Rep. Levet and Lewkners case: but see now the Statute at Oxford *17 Car. 2. for avoiding unnecessary suits and delays.*

373. If an Administrator during Minority of an Infant-Executor, recover in Debt, and the Executor comes to age before Execution taken out; in such case he may sue out a special *Scire facias* upon the Record, and so sue out Execution in his own name. *Vide 27 H. 8. fol. 7. a. Brownlows Rep. 2 part. page 83, 84.*

374. An Administrator is not liable to an Action for a Debt upon a Contract of the Intestates. *Mich. 30. 31 El. B. R. Hughsons and VVebbs case, Cro. 1 part.*

375. But if the Administrator after the Intestates death, promise to pay such a Debt; if there be a consideration to ground the Action on, it is binding. As thus: the

the Husband was indebted to another man upon a Contract for Beer, and died Intestate; the Wife took administration, and afterwards assumed upon her self to the Creditor, that if he would deliver her six Barrels of Beer, she would not only pay for them, but her Husbands debt also; in this Case it was adjudged, that Judgment should be entred *de bonis propriis* generally, for it is become a Charge by her own Act; and by her promise as Administratrix, she hath made it her own debt. *Tr. 27 El. B.R. in Wheeler and Colliers case. Cro. 1 part Rep.*

376. A Rent was granted to the Husband and Wife for their lives, the Rent is behind, and the Husband dies, and then another Rent becomes in arrear, and the Wife dies Intestate, and the Administrator brought an account of debt for both Rents in arrear, as well in the Husbands life-time, as in the Wifes,

Wifes, and adjudged the Action did well lie. *Mic.* 42,43 *El. B. R. Temple and Temples case. Cro. 1 part Rep. fol.*

377. If Administration of the debtors goods be committed to the Creditor, it doth not extinguish the debt; but if the Creditor make the debtor his Executor, it is a releafe in Law of the debt: but if a Woman-Executrix take the debtor to Husband, this is no releafe of the debt; for if he die, she may sue his Executors; for the debt was but suspended during the Coverture. *M. 31 El. B. R. Crosman and Readx case. Leonards Rep. fol.* 320. *Co. 8. li. fol.* 135. *in Sir John Needhams case, and Mich.* 1652. *B. R. Rott.* 686. *Asby and Childs case. Styles Rep. fol.* 384.

378. Where an Infant is made Executor, and Administration is committed *durante minori ætate*, and the Administrator hath goods in his hands to a great value, and the Infant

Infant at his full age releaſes to the Adminiſtrator all demands; this releaſe ſhall be charged as aſſets in the Infants hands, for ſo much as he releaſed to the Adminiſtrator. *Mich.* 15 *El. Owens Rep. fol.* 3. *and M.* 37 *El. C. B. Rittleys caſe. Gadbolts Rep. fol.* 29. *and* 9.

379. An Adminiſtrator may bring an Action of Treſpaſs or Trover and Converſion, for goods taken away before he obtained the Adminiſtration; for the Letters of Adminiſtration ſhall relate to the time of the Inteſtates death, and not to the time of granting them. *M.* 1652. *B. R. Long and Hebbs caſe. Styles Rep. fol.* 241. *M.* 3 *Car. I. B. R. Hudſon and Hudſons caſe. Latches Rep.* 214. 36 *H.* 6, 7. *Finches Law, l.* 1. *c.* 5.

380. An Adminiſtrator may retain Money in his own hands to ſatisfie his own Debt, in prejudice of other like Creditors of the Inteſtates, as well as an Executor may

6. M. 11 Jac. Bond and Greens case. Godbolts Rep. fol. 216. Tr. 13 Jac. Rot. 1906. C. B. Vaniford and Wayners case. Brownlows Rep. 1 part pag. 80.

381. An Administration may be granted upon Condition; and if the Condition be not performed, it may be revoked or repealed: but then if the Administrator before the Condition broken give away the goods, or sell them, such acts are good. Co. 6. lib. fol. 19.

382. Note, if the Testators words be indifferent to make an Executor, or universal Legatary, a Testament, or a Codicil, in such case it is usual to commit the Administration to the Widow or next of Kin, deeming the party to have died intestate. *Franc. Mantica de conject. ult. volunt. lib. 2. Tit. 3. num. 12. Swin. part 4. sect. 4. num. 8.*

383. Note, That the Ordinary may call the Administrator to account,

court, but he cannot force him to make disposition of the surplusage of the Intestates goods after debts paid, by the true meaning of the 21 *H.*8.*c.*5. but what remains shall go to the Administrator, in case there be any more debts to pay, which as yet are not come to his knowledge: and if the Ordinary will meddle to cause a disposition to be made, a Prohibition will be granted against him, if the Administrator request it. *M.*6 *Car.*1. *B. R. Ertons case. Cro.*3 *part Rep. fol. M.*15 *Jac. C. B. Tooker and Loans Case. Hobbarts Rep. fol.*190. *Pasch.* 24 *Car.*1 *B. R. Hill and Birds case. Styles Rep. fol. Brownlowes* 1 *part Rep. p.*32. *And vide Slawneys case. Hobbarts Rep. fol.*83.

384. An Administrator accompted before the Ordinary, and proved payment by one Witness: and because the Ordinary would not allow of proof by one Witness, but did excommunicate the party for want

want of proof, a Prohibition was thereupon granted, and the Book says there, that the Jurisdiction of the Spiritual Court is not taken away by the Prohibition, but their Proceedings only. *P. 2 Car. B. R. Bellamy and Aldens case. Latches Rep. fol.* 117.

385. Now as touching the Interest of the Ordinary in the goods of the Intestate that comes to his hands, note that it is only such an interest as an Administrator *durante minori ætate Executoris* hath, and therefore he cannot give nor sell the Goods of the Intestate, or do any thing to his prejudice. *M. 9. El. Dyer, fol.* 256. *Co. 2 part Inst. fol.* 398.

386. And so if the Ordinary make a Letter to one *Ad colligendum bona Defuncti, & ad vendendum ea quæ peritura essent, & inde Computum reddere:* In this case, if the Grantee sell the Goods, he may be charged as Executor of his

his own wrong; for the Ordinary himself having not power to sell, cannot give more power then he hath. *Swin. part 4. sect. 16. in fine. M. 9 El. Dyer fol. 256.*

387. If no goods come to the hands of the Ordinary, he is not chargeable by the Law; but if any come to his hands and possession, and he will neither Administer and pay the Debts and Duties himself, nor commit Administration to the Friends and Kin of the Intestate that would, then he is chargeable by the Law, for so much as comes to his hands, and is liable to the same Actions as other Administrators are: But the Ordinary cannot have an Action of Debt, Covenant, nor any other Action which belonged to the Intestate, but he to whom he commits Administration may: so that he is subject to the charge and trouble of an Administrator, but is excluded from the priviledges belonging to

an Administrator. 7 *H.4. fol.* 18. *F. N. B.* 92 *a.* *Co.* 2 *part Inst. fol.* 398. *West.* 2. *c.* 19. *Fynches Law, page* 174.

388. If an Action of Debt be brought against the Ordinary for a Debt of the Intestates, after notice given him of the same, he may not Administer to others, if he have not sufficient to satisfie that Debt. *M.* 7 *El. Dyer, fol.* 233.

389. If the Ordinary take goods of the Intestates into his hands, and after commits Administration, and notwithstanding still retains the goods; in this case he shall be charged still, as if he had not at all committed any Administration. 12 *R.* 2. *Admin.* 21. *Co.* 2 *part Inst. fol.* 398.

390. Where the Ordinary doth take Goods of the Intestates, being out of his Diocese; here he shall not be charged as Ordinary, but as Executor in his own wrong. 12 *R.* 2. *Adm.* 21. *Co.* 2 *part Inst. fol.* 398.

391. If the goods of the Intestates come to the hands of the Ordinary, and he dieth, his Executors or Administrators shall be charged in an Action of debt, by the *Statute Westm. 2. c. 19. Westm. 2. c. 19. 2. part Inst. fol.* 398. *Regist. fol.* 141. 11 *E.* 3. *Exec.* 177.

392. Having spoken before concerning a Codicil, I thought good here to insert the usual form thereof, as followeth, *viz.*

393. *Be it known unto all men by these Presents, That whereas I* Henry Walker *of* R, &c. *have made and declared my last Will and Testament in writing, bearing date,* &c. *I the said* Henry Walker *by this present Codicil do confirm and ratific my said last Will and Testament, and do give and bequeath unto* Roger Myton *of* Lympton *my best Suit of Clothes: and my Will and meaning is, that this Codicil or Schedule be, and be adjudged to be part and parcel of my said last Will and Testament; and that all things*

ings herein contained and mention-d, be faithfully and truly performed, and as fully and amply in every re-spect, as if the same were so declared and set down in my said last Will and Testament. In Witness whereof I *the said* Henry Walker *have hereunto set my Hand and Seal, this* 25th *day of* July, *in the* 19th *year of the Reign of our most Gracious Soveraign Lord King* Charles *the Second, and in the year of our Lord God* 1667.

FINIS.

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